Supreme Court, U.S.
FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LASALLE NATIONAL BANK, et al.,

Petitioners,

v.

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the Appellate Court of Illinois, Second District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Illinois Credit Agreements Act, which extinguishes the right of certain mortgagees in mortgage foreclosure actions to assert traditionally available equitable claims or defenses such as fraud or estoppel, constitutes a denial of equal protection of the laws.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiff: TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA

Defendants: LASALLE NATIONAL BANK, not personally but as Trustee under Trust Agreement dated September 4, 1984, and known as Trust No. 108920;

200 PARK PLAZA ASSOCIATES, an Illinois limited partnership;

W/H PARTNERSHIP NO. 2, an Illinois limited partnership;

MATTHEW M. WALSH, JR.;

DANIEL J. WALSH;

JOHN W. HIGGINS;

CHRISTOPHER NOON;

WALSH, HIGGINS & CO.

PARENT COMPANIES AND SUBSIDIARIES OF PETITIONERS

LaSalle National Bank is now known as LaSalle National Trust, N.A., which is a wholly owned subsidiary of LaSalle National Corporation. There are no other parent or subsidiary companies of any other petitioner.

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CITATIONS TO OFFICIAL REPORTS OF OPINIONS IN THIS CASE

Teachers Insurance and Annuity Association of America v. LaSalle National Bank, 295 Ill. App. 3d 61, 691 N.E.2d 881 (2d Dist. 1998)

Teachers Insurance & Annuity Association of America v. LaSalle National Bank, No. 85405, 1998 Ill. LEXIS 1030 (Ill. Oct. 6, 1998)

OPINIONS BELOW AND STATEMENT OF BASIS FOR JURISDICTION

The Circuit Court of DuPage County, Illinois, Eighteenth Judicial Circuit, granted the motion of Respondent Teachers Insurance and Annuity Association ("Teachers") for summary judgment on November 1, 1996. On appeal, the Illinois Appellate Court, Second District, affirmed that trial court's decision in an opinion entered on March 6, 1998. The Illinois Appellate Court denied defendants' Petition for Rehearing on April 2, 1998. On October 6, 1998, the Supreme Court of Illinois denied defendants' Petition for Leave to Appeal. The lower courts' judgments may be reviewed by this Court pursuant to 28 U.S.C. §1257, on the basis of the federal question presented.

28 U.S.C. §2403(b) may apply to this Petition and, accordingly, petitioners have served a copy of this Petition upon the Illinois Attorney General as required by Supreme Court Rule 29.4(c).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV:

Section 1. Citizens of the United States

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Illinois Credit Agreements Act

815 ILCS §160/2. Credit agreements to be in writing

§2. Credit agreements to be in writing. A debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

815 ILCS §160/3. Actions not considered agreements

§3. Actions not considered agreements. The following actions do not give rise to a claim, counterclaim, or defense by a debtor that a new credit agreement is created, unless the agreement satisfies the requirements of Section 2:

(1) the rendering of financial advice by a creditor to a debtor;

(2) the consultation by a creditor with a debtor; or

(3) the agreement by a creditor to modify or amend an existing credit agreement or to otherwise take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies in connection with an existing credit agreement, or rescheduling or extending installments due under an existing credit agreement.

STATEMENT OF THE CASE

This case involves the interpretation and application of the Illinois Credit Agreements Act, 815 ILCS 160/1, *et seq.* (the "Act"). The Act generally (1) requires that agreements to lend money or extend credit must meet certain writing requirements and (2) bars long-established and traditional claims and defenses by borrowers when those writing requirements are not satisfied. The Act, as interpreted and applied in this case, immunizes a lender from claims and defenses based upon the lender's fraud and unconscionable conduct. The Act thus denies borrowers any day in court to assert any defense whatsoever against an unethical or dishonest lender. In both the trial and appellate courts, defendants contended that if the Act permitted such a result, it was clearly unconstitutional. The Act works unprecedented changes in the relationships between lenders and commercial borrowers because it closes the courthouse to commercial borrowers regardless of the harm suffered at the hands of the lender. In point of fact, defendants here have been deprived of their property by stripping them of any ability to defend against their lender's misconduct. The result in this case conflicts with longstanding decisions of this Court articulating the parameters of the equal protection clause. Because 38 other States have enacted similar legislation in the past decade, review is warranted to resolve the important constitutional issue of first impression involved in this case.

Teachers is the holder of two notes ($27 million and $5.8 million, respectively) and a mortgage on property commonly known as 200 Park Plaza, located in Naperville, Illinois. (R.C 776, ¶¶3, 4; R.C 73; for the Court's

convenience, a copy of Defendants' Amended Answer, Affirmative Defenses and Counterclaims found at R.C 776 is included in the Appendix and will hereafter be designated "App. __, ¶ __"; *see* App. 56, ¶¶3, 4). In 1985, 200 Park Plaza was developed and constructed by defendant Walsh, Higgins & Company ("Walsh Higgins"). (*Id.*, ¶2). Prior to the foreclosure in this case, 200 Park Plaza was owned by defendant 200 Park Plaza Associates ("200 PPA"), an Illinois limited partnership. (*Id.*, ¶1).

The loan documents vest Teachers, as a lender, with control over every aspect of the project. (App. 57, ¶5; App. 57-58, ¶7; R.C 1018). The mortgage prohibits prepayment of the notes for the first 17 years of the loan, and requires Teachers' approval for all leases for the building. In addition, the $27 million note provides for the payment of "contingent interest" to Teachers equal to 50% of the profits from the building over a stipulated base. (App. 57, ¶5). From 1985 through the filing of this lawsuit, Teachers received in excess of $33 million in total payments, including more than $1.5 million in profit-sharing payments. (App. 57-58, ¶7). Finally, the extent of Teachers' control is also shown by a letter agreement between Teachers and 200 PPA entered into at the inception of the loan. That agreement requires that 200 PPA's share of the profits must be used to make distributions to limited partners, thus reducing their ownership interests in the partnership. (R.C 1018).

Upon completion of the building and with Teachers' approval, the building was leased to a single tenant, the Bell Labs Division of AT&T ("AT&T"). (App. 57, ¶6). In 1994, AT&T notified defendants that it would not

renew its lease upon the expiration of the initial lease term.

Thereafter, during the ensuing nine months—from October 1994 through June 1995—defendants engaged in extended negotiations with Teachers concerning the lack of revenue to pay Teachers due to AT&T's decision to vacate the building. The parties proceeded to agree upon the overall parameters of a restructuring of defendants' loan and defendants were encouraged by Teachers, based on the agreed upon terms, to relet the building.

At one point, as defendants were attempting to finalize lease terms with a prospective tenant, Teachers' representative, Stanley McDaniel, in response to a specific inquiry, affirmatively represented to Walsh Higgins that there would be "absolutely no backtracking" from the elements of the restructuring already agreed upon. (App. 61-62, ¶21). In reliance upon Teachers' assurances, defendants finalized a lease with an anchor tenant (to which Teachers consented on June 22, 1995), negotiated a letter of intent with another tenant and arranged for third-party financing for tenant improvements. (App. 24-25, ¶24; 39-40, ¶¶30, 32).

After consenting to the anchor tenant's lease, Teachers, on June 29, 1995, repudiated the restructuring plan. Teachers took the position that no matter what promises or assurances had been made previously on Teachers' behalf, it was not obligated to honor them because they were not in writing. (R.C 983, Wyllie Dep., pp. 112-114).

As a result of Teachers' refusal to go forward, the leases obtained by defendants were lost and, indeed,

the major anchor tenant demanded that defendants reimburse it for costs incurred in connection with the aborted lease transaction. (App. 66, ¶38).

When Teachers later commenced foreclosure proceedings, defendants asserted defenses based upon fraud, constructive fraud, breach of fiduciary duty and estoppel. Defendants alleged that in leading defendants to believe that it was interested in a restructuring and in later refusing to proceed with the restructuring terms agreed upon, Teachers was motivated by a desire to own property that Walsh Higgins' financial analyses had demonstrated was both viable and desirable. (App. 59, ¶13; App. 67, ¶40).

Teachers was granted summary judgment on its foreclosure complaint and defendants' affirmative defenses and counterclaims. (App. 45; Supp. R.C 33). In support of its motions, Teachers contended that no matter what its conduct was, the Act, as a matter of law, precluded all of defendants' claims and defenses. Although the trial court characterized as "compelling" defendants' arguments that the Act should not be applied under the circumstances of this case (Tr. 4/12/96, p. 5), the court nevertheless held that it was bound to follow what it believed to be controlling authority from the Illinois Appellate Court and, therefore, entered judgment in favor of Teachers. On March 6, 1998, the trial court's orders were affirmed in all respects by the appellate court. (App. 1-21). The Illinois Supreme Court denied defendants' Petition for Leave to Appeal on October 6, 1998. (App. 22).

Issues relating to the equal protection implications of the Act when applied to deprive foreclosure defendants

of the ability to redress a lender's fraud and unconscionable conduct were raised in the trial court, in the Illinois Appellate Court and in the Illinois Supreme Court. Specifically, in response to Teachers' motion for summary judgment in the trial court, defendants raised a number of constitutional issues, including equal protection, that were implicated if the Act was interpreted to completely eliminate all remedies for a lender's fraud and unconscionable conduct. (R.C 905: "Finally, the Act effects a denial of equal protection. If the Act is applied to prevent borrowers from defending themselves against overreaching and unconscionable conduct by lending institutions, it clearly extends far beyond the permissible scope of a statute designed to discourage meritless claims against lenders. In this respect, the Act clearly discriminates against borrowers and deprives them of the protection the law affords others who transact business in the commercial marketplace."). These arguments were likewise raised in defendants' Brief in the Illinois Appellate Court (Bf., pp. 44-45: "The Act, as interpreted by the trial court, also effects a denial of equal protection. If the Act is applied to prevent borrowers from defending themselves against overreaching and unconscionable conduct by lending institutions, it clearly extends far beyond the permissible scope of a statute designed to discourage meritless damage claims against lenders. In this respect, the Act clearly discriminates against borrowers and deprives them of the protection the law affords others who transact business in the commercial marketplace."), and in their Petition for Leave to Appeal to the Illinois Supreme Court. (Pet., p. 12: "Because it treats similarly situated individuals differently, *i.e.*, those who reach oral agreements with

corporations have available the full panoply of remedies and defenses while customers of financial institutions do not, the Act effects a denial of equal protection.")

The Illinois Appellate Court rejected defendants' equal protection claim. (App. 15-16). The court concluded that a construction of the Act that eliminated a borrowers' ability to defend an equitable action by a lender by raising traditional equitable defenses did not effect a denial of equal protection because allowing affirmative defenses based on an alleged oral credit agreement could prevent lenders from collecting otherwise valid loans. (*Id.*, at 16).

ARGUMENT

THE ILLINOIS CREDIT AGREEMENTS ACT, WHICH EXTINGUISHES THE RIGHT OF CERTAIN MORTGAGEES IN MORTGAGE FORECLOSURE ACTIONS TO ASSERT TRADITIONALLY AVAILABLE EQUITABLE CLAIMS OR DEFENSES SUCH AS FRAUD OR ESTOPPEL, CONSTITUTES A DENIAL OF EQUAL PROTECTION OF THE LAWS.

In this case, based upon the broad interpretation of the Act adopted by the Illinois courts, defendants were precluded, in an action at equity, from raising traditional, established equitable defenses to a foreclosure. Defendants were also barred from pursuing counterclaims for, among other things, fraud and equitable estoppel. Through the application of the Act, defendants were deprived of their property by being deprived of the right to litigate any of their claims or defenses. The sole justification for this result is legislation (enacted long after the contractual relationship at issue in this

case was entered into) that was interpreted to immunize lending institutions, to the profound detriment of those who do business with them, from the foreseeable and, indeed, intended consequences of the lender's own unconscionable conduct.

The Act, passed in 1989, was designed, ostensibly,[1] to address a "crisis", self-declared by the lending industry, arising out of a number of successful lender liability lawsuits in which borrowers prevailed on affirmative claims against lenders arising out of oral agreements to lend money. *See* Kouri & Karnopp, *An Act in Relation to Credit Agreements: A Statutory Defense to Lender Liability*, 78 Ill.B.J. 348 (1990) (hereafter "Kouri & Karnopp"). In those cases, lenders were held to be bound by the promises they had made. Commentators have noted that the conduct of lending institutions in making oral commitments to borrowers (and the ensuing litigation arising out of such commitments) was prompted by increased competition in the industry caused by deregulation. *See*, Note, *Limiting Lender Liability: The Trend Toward Written Credit Agreement Statutes*, 76 Minn. L. Rev. 295, 299, n.17 (1991) ("'[B]ank deregulation has resulted in increased competitive pressures which has [sic] caused lenders to restructure various traditional methods of financing.'"); *see also* Culhane & Gramlich, *Lender Liability Limitation Amendments to State Statutes of Frauds*, 45 Bus. Law. 1779, 1783 (1990). The financial institutions solved the problem of lawsuits arising from their sharp

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[1] Defendants use the word "ostensibly" because there exists no meaningful legislative history regarding the Illinois legislature's intent in enacting this statute.

practices, misrepresentations and dishonesty by obtaining the passage of legislation that bars any right of the borrower to be heard regardless of the lender's misconduct.

As interpreted and applied by the Illinois courts, the Act plainly has a discriminatory impact upon those who do business with lending institutions and curtails their rights and remedies in a manner that offends traditional notions of equal protection. This Court has for over a century recognized that state laws that extinguish a right for a particular class of persons that is generally afforded other citizens of that state run afoul of the equal protection clause of the Fourteenth Amendment. In *Poindexter v. Greenhow*, 114 U.S. 270 (1885), the Court considered a statute enacted by the State of Virginia that purported to relegate a party whose tender of tax payments was refused—and whose property was later seized to satisfy the deficiency—to a procedure that required payment under protest followed by a suit to recover the taxes wrongfully collected. The statute further decreed that "[t]here shall be no other remedy in any case of the collection of revenue, or the attempt to collect revenues illegally . . . ." 114 U.S. at 273. The Court found that the statute discriminated against the plaintiff who attempted to pay his taxes with valid bonds issued by the State of Virginia, but whose tender was refused and whose property was later seized. To relegate plaintiff to the post-seizure remedy provided would, the Court found, defeat entirely the plaintiff's right to pay the taxes with the bonds: "To take away all remedy for the enforcement of a right is to take away the right itself. But that is not within the power of the State." *Id.* at 301. Further explaining the effect of the

Virginia statute, the Court stated: "No one would contend that a law of a State, forbidding all redress for injuries to property, would be upheld in the courts of the United States, for that would be to deprive one of his property without due process of law. This is exactly what the statutes in question undertake to do, in respect to that class of persons whose property is taken from them for the offence of asserting, under the protection of the Constitution, the right to pay their taxes in coupons." *Id.* at 302-303.

Particularly instructive is the Court's opinion in *Truax v. Corrigan*, 257 U.S. 312 (1921). *Truax* concerned an Arizona statute that prohibited the issuance of an injunction in any case between an employer and present or former employees relating to the terms and conditions of employment. The statute was interpreted to prohibit issuance of an injunction to restrain the actions of striking employees who picketed outside the employer's premises, displayed banners and circulated flyers containing abusive and libelous charges against the employer, non-striking employees and patrons of the business, all of which reduced the employer's business to a fraction of what it had been prior to the strike. Addressing the employer's equal protection challenge to the statute, the Court noted that the equal protection clause "forbids the granting of equitable relief to one man and the denying of it to another under like circumstances and in the same territorial jurisdiction." *Id.* at 333. The Court concluded that the Arizona statute, which effectively immunized present and former employees under circumstances where others would be subject to injunctive relief, violated the equal protection clause.

> Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws, then it is hard to conceive what would be.

Id.

Most recently, in *Romer v. Evans*, ___ U.S. ___, 116 S. Ct. 1620 (1996), this Court invalidated, on equal protection grounds, a Colorado constitutional amendment that precluded any legislative, executive or judicial action designed to protect homosexuals, lesbians or bisexuals. Finding that the "resulting disqualification of a class of persons from the right to seek specific protection from the law is unprecedented in our jurisprudence," the Court stated:

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." [citations omitted]. Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense. "The guarantee of 'equal protection of the laws is a pledge of the protection of equal laws.'" [citations omitted].

116 S. Ct. at 1628.

The same reasoning applies here. The fact that the legislature may have perceived some threat to the stability of financial institutions posed by large damage verdicts[2] is insufficient to justify the passage of legislation which has the effect of not only eliminating such affirmative claims, but also insulating lenders from all consequences of their conduct in existing lending relationships to the point of precluding even the assertion of traditional equitable defenses to equitable claims asserted **by** lenders. As applied in this case, the Act closes the courthouse doors to the claims and defenses of commercial borrowers who transact business with lending institutions.

In this respect, the disparate impact of the Act upon those doing business in the commercial community is apparent. In any other context, a customer, for example, of a public corporation, can rely upon oral representations by corporate representatives. If those representations prove to be untrue or fraudulently made, the customer may pursue remedies or raise defenses based on that conduct. Those dealing with financial institutions, however, are precluded from suing or, as here, even defending based upon representations, fraud or deceit perpetrated by lenders. It can clearly be said that the economy is as threatened by large damage verdicts against public corporations as it is by similar verdicts against lending institutions. However, no one would suggest that a statute could validly insulate public corporations from damage claims based on oral

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[2] As noted above, there is no legislative history to indicate the legislature's intent in enacting the Act. This intent can only be presumed from contemporaneous literature alluding to a "crisis" caused by large damage verdicts against lenders.

misrepresentations or fraud in the name of stabilizing the economy. Whatever may have been the justification for legislation limiting the ability to obtain money damages against financial institutions, the elimination of *all* remedies, including affirmative defenses, for customers of those entities does not bear any reasonable relationship to that justification.

The Act, as applied in this case, cloaks a particular class—lending institutions—with immunity from suit for even the most egregious fraudulent conduct—conduct for which every other citizen of Illinois must respond. Indeed, one Illinois court has candidly recognized the potential for mischief inherent in the Act. "[S]trict application of [the Act] can easily lead to disastrous consequences in the hands of unscrupulous lenders." *Machinery Transports of Illinois v. Morton Comm. Bank*, 293 Ill. App. 3d 207, 687 N.E.2d 533, 535-36 (3d Dist. 1997). At the same time, the Act disadvantages a class consisting of commercial borrowers by stripping them not only of the ability to sue, but also even of the opportunity to raise equitable defenses based upon a lender's misconduct in response to a suit to foreclose on their property. The absolute bar imposed by the Act upon borrowers' claims has likewise been acknowledged by Illinois courts. *See First Nat'l Bank in Staunton v. McBride Chevrolet*, 267 Ill. App. 3d 367, 642 N.E.2d 138, 142 (4th Dist. 1994) ("if a bank for some reason chooses not to honor the agreement, *the customer has no recourse in the law.*" (emphasis supplied)).

The potential for overreaching by lenders under such circumstances is apparent. In cases involving ongoing relationships under existing written credit agreements,

there are established rights and obligations that the borrower is entitled to rely upon and enforce. Particularly in the case of borrowers experiencing business difficulties, lenders are typically vested with a substantial amount of discretion to direct the borrower to take action to remedy those difficulties. In virtually every situation, the lender is in a position to induce the borrower to take certain actions which, in the absence of an established course of dealing between the parties, the borrower would not take. The interpretation of the Act adopted in this case precludes the borrower from raising traditional defenses to enforcement of the agreement by the lender, including defenses based upon oral promises or representations made by the lender and intended to induce action or reliance on the borrower's part. This interpretation encourages sharp practices by unscrupulous lenders and essentially absolves lenders of the obligation to act in good faith—an immunity not accorded any other segment of the commercial community.

The goal of protecting lending institutions from the unlimited liability posed by actions for damages based upon oral credit agreements simply does not justify the complete elimination of every remedy, including affirmative defenses, afforded to those who do business with them. Because the Act confers a special immunity upon lenders by eliminating borrowers' remedies for fraud and unconscionable conduct perpetrated by lenders (except in the unlikely event that the fraud is memorialized in a written credit agreement signed by both the lender and the borrower), the Act effects a denial of equal protection to commercial borrowers in Illinois.

CONCLUSION

The Illinois Credit Agreements Act, as interpreted by the courts of Illinois, improperly eliminates the rights of a class of citizens (commercial borrowers) to assert certain claims and defenses against commercial lenders, even claims based on fraud and misrepresentation. The elimination of these claims and defenses violates petitioners' right to equal protection of the laws as guaranteed by the United States Constitution.

Petitioners respectfully pray that this Court issue a writ of certiorari to review the judgments entered by the Illinois courts in this case.

Respectfully submitted,

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APPENDIX

App. 1

[Filed March 6, 1998]

Nos. 2-96-1423, 2-97-1115, 2-97-1116, 3-97-0299
consolidated

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, Plaintiff-Appellee, v. LASALLE NATIONAL BANK, as Trustee under Trust Agreement dated September 4, 1984, and known as Trust No. 108920; 200 PARK PLAZA ASSOCIATES; W/H PARTNERSHIP NO. 2; MATTHEW M. WALSH, JR.; DANIEL J. WALSH; JOHN W. HIGGINS; CHRISTOPHER NOON; WALSH, HIGGINS AND COMPANY; NON-RECORD CLAIMANTS; and UNKNOWN OWNERS, Defendants-Appellants.	Appeal from the Circuit Court of DuPage County No. 95-CH-0829 Honorable John W. Darrah, Judge, Presiding.

JUSTICE DOYLE delivered the opinion of the court:

Defendants appeal from a summary judgment entered by the circuit court of DuPage County against them and in favor of plaintiff, Teachers Insurance and Annuity Association of America. The trial court ruled that the Credit Agreements Act (Act) (815 ILCS 160/0.01 et seq. (West 1996)) barred defendants' affirmative defenses

and counterclaims in plaintiff's action to foreclose a mortgage. Defendants raise the following issues for review: whether the Act barred their affirmative defenses and counterclaims; and whether applying the Act to bar their affirmative defenses and counterclaims was unconstitutional.

Plaintiff held a mortgage on real property improved with a commercial office building (the building) in Naperville known as 200 Park Plaza (the property). The mortgage secured two notes with an aggregate original indebtedness of $32,800,000 (collectively, the loan).

The First National Bank of Chicago was the original mortgagee. Defendant LaSalle National Bank, as trustee of a land trust, was the mortgagor. Defendant 200 Park Plaza Associates (200 PPA), a limited partnership, was the sole beneficiary of the land trust. Defendant W/H Partnership No. 2, a limited partnership, was the general partner of 200 PPA. The individual defendants are general partners of W/H Partnership No. 2. Defendant Walsh, Higgins & Co. (Walsh, Higgins), a construction and management company, constructed the building and managed the building from the time it was completed until the resolution of this action.

In September 1994, the tenant that had leased the entire building since it was opened in 1987 advised 200 PPA that it did not intend to renew its lease when the lease expired on September 30, 1995. 200 PPA immediately informed plaintiff of the tenant's decision and advised plaintiff that the loss of the building's sole tenant necessitated a restructuring of the loan.

Between October 1994 and June 1995, the parties engaged in periodic discussions regarding restructuring

the loan. The parties never executed a written agreement to restructure the loan.

In each of their affirmative defenses and counterclaims, defendants allege that during their discussions with plaintiff regarding a restructuring of the loan, plaintiff indicated that it required certain terms in order to agree to a restructuring. In an attempt to satisfy these terms, defendants developed and presented to plaintiff a recapitalization plan that included the following terms: (1) a capital contribution of $1 million by 200 PPA; (2) third-party financing of tenant improvements to the property; (3) an initial below-market interest rate coupled with a retroactive rent credit; (4) graduated increases in the interest rate during the life of the loan; and (5) a guaranteed "look back" rate of return based on a retrospective review of the transaction at the end of the loan term.

Defendants also allege that at various times during the restructuring discussions between February 3, 1995, and June 29, 1995, different spokespersons for plaintiff made statements to defendants' agents that led defendants to conclude that the proposed restructuring plan was generally acceptable to plaintiff and that only details needed to be worked out in order to finalize a restructuring agreement. Defendants further allege that on June 29, 1995, a spokesperson for plaintiff advised defendants that the proposed restructuring would not work and that plaintiff expected defendants to fund improvements without third-party financing. Plaintiff later added a requirement that defendants contribute $8 million toward improvements on an unsecured basis.

Defendants' affirmative defenses and counterclaims allege that as a result of plaintiff's refusal to comply

with the restructuring plan as it was proposed prior to June 29, 1995, defendants lost two large leases. Defendants further allege that plaintiff misled defendants regarding its intent to restructure the loan and therefore caused the loss of the leases. Defendants posit that plaintiff was motivated to mislead them by a desire to gain ownership of the property and that plaintiff has engaged in similar conduct with respect to other properties for which it was the lender.

On November 8, 1995, plaintiff filed a verified complaint against defendants seeking a judgment of foreclosure and other relief, including a judicial sale of the property. Plaintiff's complaint alleged that the loan was in default and that as of October 31, 1995, outstanding principal, accrued interest, and late charges on the loan totaled $33,778,040.15. Defendants responded with a verified answer and affirmative defenses. Plaintiff then moved for summary judgment. After a hearing on the matter, the trial court entered an order that treated plaintiff's motion for summary judgment as a motion to strike defendants' affirmative defenses on the ground that they were insufficient at law. The order then granted the motion to strike but allowed defendants to amend and refile their answer and affirmative defenses.

On July 11, 1996, defendants filed an amended answer, affirmative defenses, and counterclaims. The affirmative defenses were based on theories of breach of fiduciary duty, breach of contract, unclean hands, fraud, constructive fraud, and estoppel. The counterclaims alleged breach of fiduciary duty, breach of contract, fraud, constructive fraud, and estoppel.

Plaintiff subsequently renewed its motion for summary judgment. In support of its motion for summary

judgment, plaintiff argued that the Act barred each of defendants' affirmative defenses.

On November 1, 1996, the trial court entered an order granting plaintiff's renewed motion for summary judgment as to defendants' affirmative defenses. On November 12, 1996, plaintiff moved for summary judgment on defendants' counterclaims. Plaintiff argued that the counterclaims were substantively identical to the affirmative defenses and that the Act barred the counterclaims for the same reasons that it barred the affirmative defenses.

On December 2, 1996, the trial court entered a judgment of foreclosure and sale ordering the judicial sale of the property. On December 6, 1996, defendants filed a notice of appeal from the judgment of foreclosure and sale. The appeal was to this court and was docketed as No. 2-96-1423.

On April 10, 1997, the trial court entered an order granting plaintiff's motion for summary judgment as to defendants' counterclaims. Defendants subsequently appealed from that order. We consolidated the appeal from the April 10 order with defendants' first appeal under docket No. 2-96-1423.

Defendants subsequently filed two additional related appeals in the appellate court, third district. One of these appeals, the third appeal, was from an agreed order confirming the sale of the property. The fourth appeal was from an amended confirmation order. The third and fourth appeals were later transferred to this court. We consolidated the third and fourth appeals with the first and second appeals. The parties have not filed additional briefs regarding the third and fourth

appeals. Thus, on appeal, the parties only really dispute whether the trial court erred when it granted summary judgment in favor of plaintiff on the ground that the Act barred defendants' affirmative defenses and counterclaims.

After the consolidation of the four appeals in this court, plaintiff moved to dismiss the first, third, and fourth appeals (all the appeals except the appeal from the summary judgment order regarding defendants' counterclaims). Defendants objected and the motion was taken with the case.

We now address the motion to dismiss the first, third, and fourth appeals. Plaintiff contends that the appeals should be dismissed because they are moot. Plaintiff bases its contention on Supreme Court Rule 305(j) (155 Ill. 2d R. 305(j)) and cases decided under Rule 305(j). Plaintiff maintains that these authorities support the proposition that an appeal is moot when a disinterested third party purchases property that is the subject of the appeal and a stay of the underlying judgment has not been perfected. Plaintiff argues that the appeals in question here are moot because a disinterested third party has purchased the property and a stay has not been perfected.

Defendants respond by noting that they have challenged the constitutionality of the application of the Act to bar their affirmative defenses. Defendants contend that if they prevail on their constitutional challenges, then the Act, as applied, would be deemed void *ab initio* and they would be entitled to reclaim the property. Defendants argue that plaintiff's reliance on Rule 305(j) to extinguish their right to an appeal hearing regarding

their constitutional challenges would be a denial of due process.

We agree with defendants. We recognize that, in general, courts avoid determining whether a statute is unconstitutional if a case can be decided on other grounds. See, *e.g.*, *First National Bank v. Kusper*, 98 Ill. 2d 226, 236, 74 Ill. Dec. 505, 456 N.E.2d 7 (1983). We also recognize that Rule 305(j) and related cases arguably render defendants' appeal moot and therefore would make it unnecessary for us to reach defendants' constitutional arguments.

However, a determination that Rule 305(j) renders the appeals in question moot also prevents the resolution of defendants' constitutional arguments. This is despite the fact that if defendants are correct as to their constitutional arguments, Rule 305(j) would then operate to improperly deprive defendants of their property. In view of this possible deprivation of a fundamental right, we conclude that, under the circumstances of this case, Rule 305(j) does not render the appeals moot. See *Boddie v. Connecticut*, 401 U.S. 371, 379, 28 L. Ed. 2d 113, 120, 91 S. Ct. 780, 787 (1971) (generally valid statute may be unconstitutionally invalid to extent it operates to deprive protected rights). Accordingly, plaintiff's motion to dismiss the appeals in question is denied.

We now turn to the merits of the appeals. The central issue in these appeals is whether the trial court erred when it ruled that the Act barred defendants' affirmative defenses and counterclaims and granted summary judgment on that basis to plaintiff.

We initially note that interpreting or construing a statute is a matter of law for the court and therefore is

appropriate for summary judgment. *Matsuda v. Cook County Employees' & Officers' Annuity & Benefit Fund*, 178 Ill. 2d 360, 364, 227 Ill. Dec. 384, 687 N.E.2d 866 (1997). Our review of a grant of summary judgment is *de novo*. *Maksimovic v. Tsogalis*, 177 Ill. 2d 511, 514, 227 Ill. Dec. 98, 687 N.E.2d 21 (1997).

Our analysis of whether the Act barred defendants' affirmative defenses and counterclaims begins with a careful reading of the statute. The Act defines a "credit agreement" as:

> "an agreement or commitment by a creditor to lend money or extend credit or delay or forbear repayment of money not primarily for personal, family or household purposes, and not in connection with the issuance of credit cards." 815 ILCS 160/1(1) (West 1996).

Section 2 of the Act mandates that in order for a credit agreement to be effective, the credit agreement must be in writing and must be signed by the parties. Section 2 provides:

> "[a] debtor may not maintain an action on or in any way related to a credit agreement unless the credit agreement is in writing, expresses an agreement or commitment to lend money or extend credit or delay or forbear repayment of money, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor." 815 ILCS 160/2 (West 1996).

Section 3 of the Act is captioned "Actions not considered agreements." Section 3 provides, in relevant part:

> "The following actions do not give rise to a claim, counter-claim, or defense by a debtor that a new

credit agreement is created, unless the agreement satisfies the requirements of Section 2:

* * *

(3) the agreement by a creditor to modify or amend an existing credit agreement or to otherwise take certain actions, such as entering into a new credit agreement, forbearing from exercising remedies in connection with an existing credit agreement, or rescheduling or extending installments due under an existing credit agreement." 815 ILCS 160/3 (West 1996).

Defendants first contend that the plain words of the Act show that it did not bar their affirmative defenses and counterclaims. Defendants acknowledge that section 2 of the Act bars "an action on or in any way related to" an oral credit agreement. However, defendants argue that section 2 does not bar their affirmative defenses and counterclaims because affirmative defenses and counterclaims are not "actions."

In defendants' view, to the extent that the Act governs affirmative defenses and counterclaims, it does so in section 3. However, defendants read section 3 to bar only affirmative defenses and counterclaims based on the creation of a new oral credit agreement. Defendants argue that section 3 did not bar their affirmative defenses and counterclaims because they were not based on a new credit agreement. Rather, defendants maintain that their affirmative defenses and counterclaims were based on plaintiff's breach of the terms of the loan (the written credit agreement).

Although relatively few Illinois cases have construed the Act, those that have done so have uniformly held that the language of the Act is broad and was intended

to extend beyond the existing Frauds Act (740 ILCS 80/0.01 *et seq.* (West 1996)) to bar traditional defenses or exceptions to the Frauds Act such as equitable estoppel. *See, e.g., McAloon v. Northwest Bancorp, Inc.*, 274 Ill. App. 3d 758, 764-65, 211 Ill. Dec. 281, 654 N.E.2d 1091 (1995), *First National Bank v. McBride Chevrolet, Inc.* (*McBride*), 267 Ill. App. 3d 367, 204 Ill. Dec. 676, 642 N.E.2d 138 (1994) (Act bars all actions based on an oral credit agreement).

However, defendants contend that the Illinois cases that have construed the Act are not controlling here because they have generally not addressed fact patterns similar to the fact pattern in this case. Defendants assert that the Illinois cases have generally addressed fact patterns in which a borrower sues a lender. Defendants argue that where, as here, a lender sues a borrower and the borrower responds with counterclaims and affirmative defenses the Illinois cases simply are not applicable.

Defendants cite and urge us to follow several foreign cases. See, *e.g., Resolution Trust Corp. v. Flanagan*, 821 F. Supp. 572 (D. Minn. 1993) (credit agreement may be taken outside credit agreement act by promissory estoppel); *Norwest Bank Minnesota, N.A. v. Midwestern Machinery Co.*, 481 N.W.2d 875 (Minn. App. 1992). Defendants maintain that these cases construe statutes similar to the Act in fact patterns similar to the fact pattern in this case and conclude that borrowers may properly assert counterclaims and affirmative defenses based on oral credit agreements, notwithstanding the statutes in question.

Defendants ignore several federal cases that have construed the Act with respect to fact patterns similar

to the fact pattern in this case. For example, in *Whirlpool Financial Corp. v. Sevaux*, 96 F.3d 216 (7th Cir. 1996), a lender sued a borrower on a promissory note and the borrower raised affirmative defenses and counterclaims. The affirmative defenses and counterclaims were predicated on oral promises and assurances that the lender would invest money in the borrower's financially troubled corporation and that the investment would extinguish the note. The seventh circuit affirmed the district court's summary judgment order in favor of the lender based on a ruling that the Act barred the affirmative defenses and counterclaims.

In *Whirlpool*, the borrower's affirmative defenses and counterclaims were based on theories of fraud, estoppel, breach of fiduciary duty, and breach of contract. *Whirlpool*, 96 F.3d at 220. The borrower asserted that the Act applied only to "actions" and therefore did not apply to his affirmative defenses and counterclaims because they were not "actions" as used in the Act. *Whirlpool*, 96 F.3d at 225. The court held that the borrower's counterclaims were "actions" and that section 2 of the Act barred them because they were based on an alleged oral agreement. *Whirlpool*, 96 F.3d at 225. The court next determined that the borrower's affirmative defenses were based on the same oral agreement and that section 3 of the Act therefore barred the affirmative defenses. *Whirlpool*, 96 F.3d at 226. The court cited with approval *McBride* and other Illinois cases. *Whirlpool*, 96 F.3d at 225-26.

In *Westinghouse Electric Corp. v. McLean*, 938 F. Supp. 487 (N.D. Ill. 1996), a lender sued guarantors of notes that were in default. The guarantors raised counterclaims and affirmative defenses based on theories of

fraud and breach of a duty of good faith and fair dealing. The court granted the lender's motion for summary judgment based primarily on a determination that the Act barred the counterclaims and affirmative defenses. With respect to the good faith claim, the court also determined that the lender did not exercise bad faith. *Westinghouse Electric Corp.*, 938 F. Supp. at 493-94. As to the applicability of the Act, the court cited *McBride* for the proposition that the "Act bars all claims, whether sounding in contract or tort." *Id.* at 490.

In *General Electric Capital Corp. v. Donogh Homes, Inc.*, 1993 U.S. Dist. LEXIS 17690, No. 93 C 5614 (N.D. Ill. December 15, 1993) (mem. op.), the federal court construed the Act in a case brought by a lender against guarantors of defaulted loans. The guarantors raised counterclaims and affirmative defenses based on various theories that included promissory estoppel, misrepresentation, and breach of a contractual duty of good faith and fair dealing. The guarantors asserted that their claims arose out of the written loans rather than the lender's alleged oral agreement to extend and modify the loans. The court granted the lender's motions to dismiss the counterclaims and strike the affirmative defenses after finding that the guarantors' arguments were based on the oral agreement and not the written agreements. *General Electric Capital Corp.*, mem. op. at 7.

We believe these federal cases correctly construe the Act and correctly apply the Act to fact patterns similar to the fact pattern in this case. Consequently, we will follow these cases and will not follow the foreign cases cited by defendants.

In these cases, one of the critical determinations in deciding whether the Act barred counterclaims and affirmative defenses was a determination of whether the counterclaims and affirmative defenses in question were based on an oral credit agreement. In this case, defendants strenuously argue that their counterclaims and affirmative defenses are not based on an oral credit agreement. However, a careful reading of defendants' counterclaims and affirmative defenses shows that they are all based on an alleged oral agreement by plaintiff to restructure the loan.

Defendants do not contend that the written credit agreement required plaintiff to restructure the loan. Rather, all of defendants' counterclaims and affirmative defenses are based on plaintiff's alleged conduct in reneging on its alleged agreement to restructure the loan. This conduct plainly amounts to a purported agreement by plaintiff to "modify or amend" the loan and therefore falls within section 3 of the Act. 815 ILCS 160/3 (West 1996). Because the purported credit agreement to modify or amend the loans is not written and signed by the parties, section 3 bars any counterclaims or defenses based on it. Accordingly, the trial court did not err when it ruled that the Act barred defendants' affirmative defenses and counterclaims.

Defendants argue at length that plaintiff breached a fiduciary duty owed to defendants. Defendants contend that the fiduciary duty arose from the written credit agreement and that the Act therefore did not bar their affirmative defense or counterclaim that asserted breach of fiduciary duty.

A mortgagor-mortgagee relationship does not create a fiduciary relationship as a matter of law. *Northern*

Trust Co. v. Halas, 257 Ill. App. 3d 565, 572, 195 Ill. Dec. 850, 629 N.E.2d 158 (1993). Where the alleged fiduciary relationship does not exist as a matter of law, the party claiming that a fiduciary relationship exists must plead facts from which a fiduciary relationship arises. *Santa Claus Industries, Inc. v. First National Bank*, 216 Ill. App. 3d 231, 238, 159 Ill. Dec. 657, 576 N.E.2d 326 (1991).

Defendants' allegations do not support the existence of a fiduciary relationship based on the written credit agreement. The factors that defendants cite in their pleadings simply do not show that the parties' relationship went beyond the typical lender-borrower relationship. The normal trust between contracting parties does not operate to turn a formal, contractual relationship into a fiduciary relationship unless one of the parties places great trust in and relies heavily on the judgment of the other party. *Carey Electric Contracting, Inc. v. First National Bank*, 74 Ill. App. 3d 233, 238, 30 Ill. Dec. 104, 392 N.E.2d 759 (1979). Defendants have not pointed to anything in the written credit agreement that would support a finding that defendants placed great trust in and relied on plaintiff as to any of the terms in the written credit agreement.

On this record, defendants have not pleaded a sufficient factual basis to support the existence of a fiduciary relationship between the parties based on the written credit agreement. Therefore, defendants' argument that plaintiff breached a fiduciary duty arising from such a relationship is without merit.

Defendants next contend that, under the circumstances of this case, the trial court's application of the Act

was unconstitutional. In their appeal brief, defendants argue that such an application "(1) abrogates common law rights and remedies which were in existence at the time the contract was formed; (2) impairs defendants' contractual rights, including the right to enforce [plaintiff's] implied covenant of good faith and fair dealing; (3) constitutes special legislation; (4) effects a denial of equal protection; and (5) violates the constitutional proscription against dual purpose legislation."

Familiar standards guide us in examining the constitutionality of a statute. A legislative enactment enjoys a heavy presumption of constitutionality, and the challenging party has the burden of establishing a statute's invalidity. *In re Marriage of Lappe*, 176 Ill. 2d 414, 422, 223 Ill. Dec. 647, 680 N.E.2d 380 (1997). We must resolve all reasonable doubts in favor of upholding the validity of the statute. *People v. Davis*, 177 Ill. 2d 495, 501, 227 Ill. Dec. 101, 687 N.E.2d 24 (1997).

This court previously addressed constitutional challenges to the Act in *Nordstrom v. Wauconda National Bank*, 282 Ill. App. 3d 142, 218 Ill. Dec. 102, 668 N.E. 2d 586 (1996). In that case, the plaintiff borrowers contended that applying the Act to bar a promissory estoppel count of the complaint they brought against a lender was unconstitutional because it violated their equal protection and due process rights and constituted special legislation. We determined that applying the Act to bar the promissory estoppel count was not a violation of the plaintiffs' equal protection rights and did not constitute special legislation because the Act was rationally related to its purpose of protecting not only the special interests of lending institutions but also the

depositors of such institutions. *Nordstrom*, 282 Ill. App. 3d at 146.

Here, defendants contend that the reasoning in *Nordstrom* does not apply to the situation presented in this case where a borrower seeks to assert defenses against a lender's foreclosure action involving alleged fraudulent or inequitable conduct by the lender. Plaintiff responds that the reasoning in *Nordstrom* does apply in this case because allowing affirmative defenses based on an alleged oral credit agreement could prevent lenders from collecting otherwise valid loans and severely impact both lending institutions and their depositors.

We agree with plaintiff that applying the Act to bar defenses based on an alleged oral credit agreement in this case would serve the same purposes delineated in *Nordstrom*. Therefore, applying the Act to bar defendants' defenses in this case was not a violation of defendants' equal protection rights and was not unconstitutional special legislation for the reasons given in *Nordstrom*. Accordingly, we need not further address defendants' contentions that the trial court's ruling violated defendants' equal protection rights or amounted to unconstitutional special legislation.

We next address defendants' contention that the trial court ruling unconstitutionally abrogated common-law rights and remedies in existence at the time the contract was formed. More specifically, defendants assert that the trial court ruling left them without a remedy in violation of the "certain remedy" provision in article I, section 12, of the Illinois Constitution.

Article I, section 12, of the Illinois Constitution provides:

> "Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly." Ill. Const. 1970, art. I, § 12.

Our supreme court has repeatedly stated that the "certain remedy" provision is merely an expression of philosophy and does not mandate that a certain remedy be provided in any form for any alleged wrong. See, *e.g.*, *McAlister v. Schick*, 147 Ill. 2d 84, 98, 167 Ill. Dec. 1021, 588 N.E.2d 1151 (1992). Moreover, the legislature has the inherent power to repeal or change the common law and may do away with all or part of it. *People v. Gersch*, 135 Ill. 2d 384, 395, 142 Ill. Dec. 767, 553 N.E. 2d 281 (1990). The legislature also has broad discretion to determine whether a statute that restricts or alters an existing remedy is reasonably necessary to promote the general welfare. *Bilyk v. Chicago Transit Authority*, 125 Ill. 2d 230, 245, 125 Ill. Dec. 822, 531 N.E.2d 1 (1988).

Based on these principles, we conclude that the Act is well within the legislature's powers. Accordingly, defendants' "certain remedy" argument fails.

Defendants also contend that applying the Act as the trial court did in this case was an *ex post facto* violation because the written credit agreement predated the Act. However, the Act was plainly in force at the time the purported oral credit agreement was formed. Because the alleged misconduct is based on the purported oral credit agreement, the Act plainly applied. It is presumed that parties contract with knowledge of the existing law. *Braye v. Archer-Daniels-Midland Co.*, 175 Ill. 2d 201, 217, 222 Ill. Dec. 91, 676 N.E.2d 1295

(1997). For these reasons, defendants' *ex post facto* argument fails.

Defendants next contend that applying the Act to bar their defenses unconstitutionally impaired existing contractual obligations arising from the written credit agreement by denying their right to enforce plaintiff's duty of good faith and fair dealing. Defendants do not specify the exact conduct that allegedly amounted to a breach by plaintiff of its duty of good faith and fair dealing. Based on their general arguments, defendants presumably contend that plaintiff breached its duty of good faith and fair dealing by abusing its discretion to approve leases under the written credit agreement.

As a matter of law in Illinois, a duty of good faith and fair dealing is implied in every contract. *Saunders v. Michigan Avenue National Bank*, 278 Ill. App. 3d 307, 315, 214 Ill. Dec. 1036, 662 N.E.2d 602 (1996). The duty requires a party vested with contractual discretion to exercise that discretion reasonably and not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties. *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 367, 212 Ill. Dec. 750, 657 N.E.2d 1095 (1995).

Under these principles, defendants might have a valid argument if the only conduct they complained of was plaintiff's alleged abuse of discretion in approving leases. However, plaintiff's alleged conduct regarding leases is inextricably linked to plaintiff's alleged conduct in reneging on its oral agreement to restructure the loan. It is undisputed that the written credit agreement did not require plaintiff to restructure the loan. Nonetheless, defendants state that the loss of leases

resulted from plaintiff's refusal to go forward with the restructuring after plaintiff orally promised not to backtrack from a proposed restructuring plan.

Because defendants' own description of the alleged breach of a duty of good faith and fair dealing shows that it is really based on the purported oral credit agreement to restructure the loans, we conclude that defendants are attempting to bootstrap the alleged breach of a duty of good faith and fair dealing stemming from the written credit agreement into an alleged breach of a duty of good faith and fair dealing arising from the purported oral credit agreement. We decline to extend the implied duty of good faith and fair dealing to the extent urged by defendants. Accordingly, defendants' argument that plaintiff breached a duty of good faith and fair dealing fails.

Finally, defendants contend that the trial court's ruling violated the constitutional proscription against dual purpose legislation that is usually referred to as the single subject rule. The single subject rule is stated in article IV, section 8(d), of the Illinois Constitution of 1970 which provides, in relevant part:

> "Bills, except bills for appropriations and for the codification, revision or rearrangement of laws, shall be confined to one subject." Ill. Const. 1970, art. IV, § 8(d).

In defendants' view, the trial court ruling violated the single subject rule because it interpreted the Act not only as a means of protecting lenders against spurious lender liability complaints based on oral credit agreements but also as a vehicle that lenders could use to strip borrowers of defenses that would otherwise be available to them in actions against them on a written

credit agreement. Defendants argue that because the latter purpose bears no rational relationship to the former purpose, the Act as applied by the trial court violates the single subject rule.

Our supreme court recently set out the principles that guide us in reviewing legislation to determine whether it violates the single subject rule. The court stated:

> "The term 'subject,' in this context, is to be liberally construed and the subject may be as broad as the legislature chooses. [Citation.] Nonetheless, the matters included in the enactment must have a natural and logical connection. [Citations.] The rule prohibits the inclusion of '"discordant provisions that by no fair intendment can be considered as having any legitimate relation to each other."' [Citation.]
>
> As the above principles elucidate, the single subject rule does not impose an onerous restriction on the legislature's actions. Rather, the rule leaves the legislature with wide latitude in determining the content of bills." *Johnson v. Edgar*, 176 Ill. 2d 499, 515, 224 Ill. Dec. 1, 680 N.E.2d 1372 (1997).

Under these principles, the Act as applied to this case clearly satisfies the single subject rule. Even if we accepted, for the sake of argument, defendants' characterization of the two "purposes" of the Act, it is obvious that the single subject of the Act is a writing requirement for credit agreements. Accordingly, defendants' argument that the trial court's application of the Act violated the single subject rule is unpersuasive.

In sum, we conclude that the trial court did not err when it granted summary judgment in favor of plaintiff on the ground that the Act barred defendants' counter-

claims and affirmative defenses. In addition, defendants did not carry their burden of showing that the trial court's application of the Act was unconstitutional.

Based on the foregoing, the judgment of the circuit court of Du Page County is affirmed.

AFFIRMED

BOWMAN and COLWELL, JJ., concur.

March 6, 1998, Filed

Teachers Insurance and Annuity Association of America, respondent, v. LaSalle National Bank, etc., et al., petitioners.

No. 85405

SUPREME COURT OF ILLINOIS

1998 Ill. LEXIS 1030

October 6, 1998, Decided

NOTICE: DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY: Leave to appeal, Appellate Court, Second District. (2-96-1423, 2-97-1115, 2-97-1116, 3-97-0299).

OPINION: Petition for leave to appeal denied.

[Dated December 2, 1996]

FIRM I.D. NO. 53280
IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, a New York corporation,	)	
Plaintiff,	)	
vs.	)	No. 95 CH 0829
	)	Judge Darrah
LASALLE NATIONAL BANK, not personally but as Trustee under Trust Agreement dated September 4, 1984 and known as Trust No. 108920; 200 PARK PLAZA ASSOCIATES, an Illinois limited partnership; W/H PARTNERSHIP NO. 2, an Illinois limited partnership; MATTHEW M. WALSH, JR.; DANIEL J. WALSH; JOHN W. HIGGINS; CHRISTOPHER NOON; WALSH, HIGGINS & CO.; NON-RECORD CLAIMANTS; and UNKNOWN OWNERS,	)	Courtroom 2005
Defendants.	)	

JUDGMENT OF FORECLOSURE AND SALE

This matter coming to be heard on the renewed motion of Plaintiff Teachers Insurance and Annuity Association of America (including hereafter its designated assignee or successor, "Plaintiff"), for summary judgment pursuant to Section 5/2-1005 of the Illinois Code of Civil Procedure with respect to certain commer-

cial property described in paragraph 3(i) of Plaintiff's Verified Complaint for Foreclosure and Other Relief and commonly known as 200 Park Plaza, Naperville, Illinois, and the Court being fully advised in the premises, having considered the pleadings, motions and affidavits presented and having ruled that the defendants' amended affirmative defenses were insufficient, as a matter of law, to defeat Plaintiff's right to entry of this Judgment of Foreclosure and Sale,

THE COURT HEREBY FINDS AS FOLLOWS:

I. JURISDICTION

1. This Court has jurisdiction over the parties and the subject matter hereof.

2. Plaintiff filed its Verified Complaint for Foreclosure and Other Relief ("Complaint") in this case on November 8, 1995.

3. The Complaint joined as parties-defendant: LaSalle National Bank, as trustee under Trust No. 108920; 200 Park Plaza Associates; W/H Partnership No. 2; Matthew M. Walsh, Jr.; Daniel J. Walsh; John W. Higgins; Christopher Noon; Walsh, Higgins & Co. (collectively, the foregoing defendants are sometimes referred to herein as the "Named Defendants"); Non-Record Claimants; and Unknown Owners.

4. Summonses and Complaints were properly served on the following defendants on the following dates:

Defendant	Date of Service
LaSalle National Bank	November 16, 1995
200 Park Plaza Associates	November 16, 1995
W/H Partnership No. 2	November 16, 1995

Matthew M. Walsh, Jr.	November 16, 1995
Daniel J. Walsh	November 16, 1995
John W. Higgins	November 16, 1995
Christopher Noon	November 16, 1995
Walsh, Higgins & Co.	November 16, 1995
Unknown Owners	December 01, 1995 December 08, 1995 December 15, 1995 (by publication)
Non-Record Claimants	December 01, 1995 December 08, 1995 December 15, 1995 (by publication)

5. The Court specifically finds service of process was properly made in accordance with the Illinois Code of Civil Procedure with respect to defendants LaSalle National Bank, as trustee under Trust No. 108920; 200 Park Plaza Associates; W/H Partnership No. 2; Matthew M. Walsh, Jr.; Daniel J. Walsh; John W. Higgins; Christopher Noon; Walsh, Higgins & Co.; Unknown Owners and Non-Record Claimants.

6. Appearances were filed on November 16, 1995 by the Named Defendants. Defendants Unknown Owners and Non-Record Claimants have not appeared or otherwise responded to this action.

II. EVIDENTIARY FINDINGS

7. True and correct copies of the "Mortgage, as modified" and "Notes" (as those terms are defined in the Complaint) are attached as Group Exhibits A and B to the Complaint (collectively, the "Loan Documents").

8. The Loan Documents are admitted into evidence.

9. Information concerning the Mortgage to be foreclosed:

(a) **Nature of Instrument:** Mortgage;

(b) **Date of Mortgage:** August 9, 1985, as modified by that certain First Modification dated March 20, 1987 and as further modified by that certain Second Modification dated November 20, 1987;

(c) **Name of Mortgagor:** LaSalle National Bank, not individually but solely as Trustee under Trust Agreement dated September 4, 1984 and known as Trust No. 108920 ("Mortgagor");

(d) **Name of original Mortgagee:** First National Bank of Chicago;

(e) **Dates and place of recording:** August 21, 1985, March 20, 1987 and December 1, 1987; Office of the Recorder of Deeds of Du Page County;

(f) **Identification of recordings:** R85-69263 and 85U-4386; R87-038820; and R87-169372;

(g) **Interest subject to the Mortgage:** fee simple;

(h) **Amount of original principal indebtedness under the Mortgage:** $27,000,000.00, increased to $32,800,000 by Mortgage Note No. 2;

(i) **Legal description of mortgaged real estate and common address:** A true and accurate legal description of the mortgaged real estate is attached as Exhibit C to the Complaint, which exhibit is admitted into evidence;

Commonly known as: 200 Park Plaza, Naperville, DuPage County, Illinois (the "Mortgaged Premises");

Permanent Index No.: 07-01-400-034;

(j) **Statement as to defaults and amount now due:**

Pursuant to the express terms of the Notes and Mortgage, as modified, the entire unpaid principal balance of the Notes, together with all accrued and unpaid interest thereon, became due and payable. Under the express terms of the Notes, an event of default occurred as a consequence of Mortgagor's failure to pay amounts due under the notes commencing September 1, 1995, which default resulted in Plaintiff's delivery to mortgagor of an acceleration notice on November 7, 1995 that properly accelerated all amounts due and payable under the Notes. Accordingly, as of November 1, 1996, the following amounts (exclusive of attorneys' fees and costs and other related charges) were due and owing to Plaintiff:

Note No. 1:

Outstanding Principal	$26,984,004.68
Accrued Interest at non-default rate of 12.375% (from 8/1/95-11/6/95)	$ 890,472.15
Accrued Interest at default rate of 15.000% (from 11/7/95-11/1/96)	$ 4,002,627.59
Sub-Total	$31,877,104.42

Note No. 2:

Outstanding Principal	$ 5,792,372.38
Accrued Interest at non default rate of 12.375% (from 8/1/95-11/6/95)	$ 191,148.29
Accrued Interest at default rate of 15.000% (from 11/7/95-11/1/96)	$ 859,201.98
Sub-Total	$ 6,842,722.65
TOTAL AMOUNT DUE . . .	$38,719,827.07

(k) **Statement as to per diem interest accruing under the Mortgage, as modified, as of November 1, 1996** $13,656.83, consisting of $11,243.34 on Note 1 and $2,413.49 on Note No. 2, which when calculated together through the date of entry of this Judgment of Foreclosure yields the total outstanding balance due and owing to Plaintiff (the "Indebtedness"), exclusive of attorneys' fees and expenses incurred by Plaintiff;

(l) **Name of present owner of the real estate:** LaSalle National Bank, not personally but as Trustee under Trust Agreement dated September 4, 1984 and known as Trust No. 108920;

(m) **Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated:** 200 PARK PLAZA ASSOCIATES; W/H PARTNERSHIP NO. 2; MATTHEW M. WALSH, JR.; DANIEL J. WALSH; JOHN W. HIGGINS; CHRISTOPHER NOON; WALSH, HIGGINS & CO.; NON-RECORD CLAIMANTS; and UNKNOWN OWNERS;

(o) **Names of defendants claimed to be personally liable for deficiency, if any:** By obtaining entry of this Judgment of Foreclosure, Plaintiff does not waive any rights it may have against the defendants for any personal liability (the subject loan being generally non-recourse), although Plaintiff is not claiming any such liability in this Judgment of Foreclosure;

(p) **Capacity in which Plaintiff brings this foreclosure:** Plaintiff is the assignee and present holder of the Notes and Mortgage, as modified;

(q) **Facts in support of a waiver of redemption period:** Pursuant to paragraph 29 of the Mortgage, as modified, the mortgagor has waived all rights of redemption on behalf of Mortgagor and on behalf of all other persons acquiring any interest in or title to the Mortgaged Premises subsequent to the date of the Mortgage, as modified (except as to decree or judgment creditors); and

(n) **Facts in support of request for attorneys' fees and costs and expenses:** Pursuant to the paragraph 15 of the Mortgage, all costs and expenses, including reasonable attorneys fees incurred, with interest, in addition to principal and interest under the Note, are recoverable herein and Plaintiff's right to include any and all such amounts in an amended or supplemented judgment of foreclosure are expressly reserved.

10. Commencing September 1, 1995, defaults occurred under the Notes by reason of the failure of the Mortgagor to make payments of principal and interest as due and required under the Mortgage, as modified,

and related Loan Documents. As a consequence of said defaults, Plaintiff properly accelerated all amounts due and owing under the Notes and related Loan Documents by sending an acceleration notice on November 7, 1995 to Mortgagor.

11. By reason of the above-described defaults, Plaintiff is entitled to foreclose on the Mortgaged Premises, including the real estate and any attendant property set forth in the Loan Documents, (including, without limitations the property set forth on pages 2-3 of the Mortgage, as modified), to take possession of or to dispose of such property at public sale as may be in the form of personal property, to collect all rents, royalties, issue, profits, revenue, income and other benefits from the mortgaged Premises and to apply the proceeds of the sale to its expenses and to the obligations secured by the Mortgage, as modified, and related Loan Documents.

III. ALLEGATIONS DEEMED PROVED

12. On the date indicated in the Complaint, the Mortgagor was justly indebted to Plaintiff in the amount of the indebtedness as indicated therein.

13. The exhibits attached to the Complaint are true and correct copies of the Mortgage, as modified and the Notes.

14. The Named Defendants, as defined herein, were on the date indicated in the Complaint, owner of the legal and beneficial interest in the real estate described therein, and, as of the date set forth in the Mortgage, had made, executed, and delivered the Mortgage, as modified, on the Mortgaged Premises, as security for the Notes.

15. This is not a foreclosure of a mortgage on residential real estate.

16. The Mortgage, as modified, was recorded in the Office of the Recorder of Deeds of Du Page County, the county in which the Mortgaged Premises is located, on August 21, 1985, March 20, 1987 and December 1, 1987, as document numbers R85-69263 and 85U-4386; R87-038820; and R87-169372, respectively.

17. Defaults occurred as indicated in the Complaint and in evidence or affidavits presented to the Court.

18. The Mortgage, as modified on the Mortgaged Premises constitutes a valid, prior and paramount lien upon the indicated interest in the mortgaged Premises, which lien is prior and superior to the right, title, interest, claim or lien of all parties, unknown owners and non-record claimants, all of whose interests in the Mortgaged Premises are terminated by this foreclosure action, subject only to paragraph 30 hereof.

19. Pursuant to Plaintiff's rights under the Mortgage, as modified, and related Loan Documents, Plaintiff has a valid, prior and paramount security interest in any additional property secured by its Loan Documents (including, without limitation, the Mortgage, as modified, as set forth on pages 2-3 thereof), which security interest is prior and superior to the right, title, interest, claim or lien of all parties, unknown owners and non-record claimants, all of whose interests any such property are terminated by this foreclosure action, subject only to paragraph 30 hereof.

20. By reason of the defaults alleged and proved and pursuant to the express provisions of the Loan

Documents, the entire Indebtedness secured by the Mortgage, as modified, is immediately due and payable.

21. Any and all notices of default or other notices required to be given to the Mortgagor, the other Named Defendants, as defined herein, or any other party, whether known or unknown, who has or may have an interest in the Mortgaged Premises or its attendant property have been duly and properly given by Plaintiff.

22. Any and all periods of grace or other period of time allowed for the performance of the covenants or conditions claimed to be breached or for the curing of any breaches under the Mortgage, as modified, and related Loan Documents have expired.

23. In accordance with Illinois law, and pursuant to the terms of the Mortgage, as modified, Mortgagor has waived any and all rights of redemption from or before a sale under any order or decree or judgment of foreclosure of the Mortgage, as modified, on its own behalf and on behalf of each and every person acquiring any interest in or title to the Mortgaged Premises subsequent to the date of the Mortgage, as modified. Said waiver is valid, binding and effective.

24. The amount indicated to be due and owing is broken down into various items in the statement herein and in the affidavits presented to the Court; the same are correctly stated and if such breakdown indicates any advances made or to be made by the Plaintiff, such advances constitute additional indebtedness secured by the Mortgage, as modified.

IV. FEES AND COSTS

25. Plaintiff has been compelled to employ and retain attorneys to prepare and file the complaint and to represent and advise the Plaintiff in this foreclosure action, and the Plaintiff has and will thereby become liable for the attorneys' usual, reasonable and customary fees in that behalf.

26. Plaintiff has been compelled to advance, or will be compelled to advance, various sums of money in payment of costs, fees, expenses and disbursements incurred in connection with either its interest in the Mortgaged Premises or prosecution of this foreclosure action, including, without limiting the generality of the foregoing, the appointment of a receiver and all fees, costs and expenses associated therewith (the "Receiver Expenses"), real estate taxes, filing fees, costs of publication, costs of procuring and preparing documentary evidence and costs of procuring abstracts of title, foreclosure minutes and a title insurance policy. In addition, other costs have been or may be incurred by Plaintiff, such as the cost of obtaining a current appraisal, which costs have been occasioned by this foreclosure action.

27. Under the terms of the Mortgage, all such advances, costs, attorneys' fees, Receiver Expenses and other fees, expenses and disbursements are secured by the Mortgaged Premises and Plaintiff is entitled to recover from the Mortgaged Premises all such advances, costs, attorneys' fees, Receiver Expenses and other fees, expenses and disbursements, together with interest on all advances at the rate provided therein, from the date on which such advances are or were made.

V. ULTIMATE FINDINGS

28. The allegations in the Complaint are substantially true as set forth therein, the equities in the cause are with Plaintiff, and Plaintiff is entitled to the relief requested in the Complaint, including foreclosure of (i) said Mortgage, as modified, upon the real estate described therein, and (ii) Plaintiff's security interest in any attendant property to the Mortgaged premises (which property, if any, is set forth in the Loan Documents, including, without limitation, on pages 2-3 of the Mortgage, as modified), to secure and obtain payment of the Indebtedness, as found in paragraphs 9(j) and (k) above, together with interest thereon at the statutory rate after the entry of this judgment and additional court costs, including publication costs and expenses of sale.

29. The defendants named herein, including the Mortgagor and other Named Defendants, as defined herein, Non-Record Claimants and Unknown Owners, are found and declared to have no continuing interest in the Mortgaged Premises.

30. The Court finds that the Mortgaged Premises, including any attendant property thereto as set forth in the Loan Documents (including, without limitation, on pages 2-3 of the Mortgage, as modified), is, and, upon the vesting of title thereto in any purchaser at the foreclosure sale, will be free and clear of all liens, claims, and encumbrances except all easements and restrictions of record that were recorded prior to the Mortgage, as modified.

31. To the extent not already included in the Indebtedness, Plaintiff is entitled to request at a hearing

to be held at or before entry of an order closing these foreclosure proceedings that the reasonable attorneys' fees and costs incurred by Plaintiff from the enforcement of its rights under the Loan Documents be included in the Indebtedness. Notwithstanding the foregoing, the entry of an order awarding Plaintiff such fees and costs shall not create any personal liability on the part of the Named Defendants, as defined herein, that is otherwise inconsistent with the findings of this Judgment of Foreclosure or the Loan Documents.

IT IS THEREFORE, ORDERED, ADJUDGED AND DECREED that a judgment for foreclosure and sale is granted to Plaintiff and against all defendants.

IT IS FURTHER ORDERED AS FOLLOWS:

VI. ORDER UPON REQUEST FOR FORECLOSURE

32. The Mortgaged Premises, including any attendant property as set forth in the Loan Documents (including, without limitations, on pages 2-3 of the Mortgage, as modified), collectively, the "Mortgaged Property"), shall be sold to satisfy the amount due to Plaintiff as set forth in this Judgment of Foreclosure, together with the interest thereon at the statutory judgment rate from the date of this Judgment of Foreclosure.

33. In the event Plaintiff is the purchaser of the Mortgaged Property at such sale, Plaintiff may offset against the purchase price of the Mortgaged Property the amounts due under this Judgment of Foreclosure and order confirming such sale.

34. Except as otherwise expressly set forth in paragraph 30 hereof, in the event of such sale of the Mort-

gaged Property, all defendants made parties to this foreclosure action and all non-record claimants and unknown owners given notice of this foreclosure action, and all persons claiming by, through or under them, and each and any and all of them, shall be forever barred and foreclosed of any right, title, interest, claim, lien or right to redeem in and to the Mortgaged Property.

35. A deed and bill of sale shall be issued to the purchaser of Mortgaged Property at the sale and such purchaser shall be let into possession of the Mortgaged Property.

VII. ORDER FOR JUDICIAL SALE

36. Sale The Mortgaged Property is ordered sold, including any attendant property as set forth in the Loan Documents (including, without limitation, pages 2-3 of the Mortgage, as modified), as Plaintiff may want to offer for sale, under the following terms:

(a) The sale shall be by public auction;

(b) The sale shall be by open verbal bid; and

(c) The sale shall be conducted by The Intercounty Judicial Sales Corporation (the "Selling Officer"), which by this Judgment of Foreclosure is hereby appointed the Selling Officer on the terms set forth herein without need for further order of the Court.

37. Notice of Sale The Selling Officer shall give public notice of the sale as follows:

(a) The notice of sale shall include the following information, but an immaterial error in the information shall not invalidate the legal effect of the notice:

i. the name, address and telephone number of the person to contact for information regarding the Mortgaged Property;

ii. the common address and other common description (other than legal description) of the Mortgaged Property;

iii. a legal description of the Mortgaged Premises, as set forth in paragraph 9(i) hereof;

iv. a general description of the improvements on the Mortgaged Premises;

v. whether the Mortgaged Property may be inspected prior to sale;

vii. the time and place of the sale;

viii. the terms of the sale, which terms shall include the requirement (unless waived by the Plaintiff in its discretion) that (x) all bids at the auction be made without reservation or contingency, (y) the successful bidder at the sale, if it is someone other than Plaintiff, pay the amount bid by way of cash, certified check or wire transfer, with ten (10) percent of the purchase price to be paid at the time of the sale and the balance to be paid within twenty-four (24) hours and (z) the sale be on an "as is-where is" basis, without representation or warranty;

ix. the case title, case number and the court in which this foreclosure action was filed;

x. the name and telephone number of Plaintiff's attorney, if different that subparagraph (i) above; and

xi. no other information is required.

(b) The notice of sale shall be published at least three consecutive calendar weeks (Sunday through Saturday), once in each week, the first such notice to be published not more than 45 days prior to the sale, the last such notice to be published not less than 7 days prior to the sale, by;

i. (A) an advertisement in a newspaper circulated to the general public in the county in which the Mortgaged Property is located, in the section of that newspaper where legal notices are commonly placed; and

(B) a separate advertisement in the section of such newspaper, which may be the same newspaper, in which real estate other than real estate being sold as part of legal proceedings is commonly advertised to the general public; provided, that where both advertisements could be published in the same newspaper and that newspaper does not have separate legal notices and real estate advertisement sections, a single advertisement sale shall be sufficient; and

ii. no other publication shall be required.

(c) Plaintiff shall also give notice to all parties in this foreclosure action who have appeared and have not heretofore been found by the court to be in default for failure to plead, if any. Such notice shall be given in the manner provided in the applicable rules of court for service of papers other than process and complaint, not more than 28 days nor less than 7 days prior to the day of sale. After notice is given as required in this Section, a copy thereof shall be filed in the

Office of the Clerk of this Court, together with a Certificate of Counsel or other proof that notice has been served in compliance with this Section. Except as provided in the following section, no other notice by publication or posting shall be necessary.

(d) The Selling Officer shall again give notice of any adjourned sale if the adjourned sale is to be conducted more than 60 days after the date on which the sale was first to be held, but, if the sale is adjourned to a date within such 60 day period, then neither the Selling Officer nor Plaintiff shall be required to provide any additional notice of such adjourned sale date.

(e) The person named in the notice of sale to be contacted for information about the Mortgaged Property shall not be required to provide additional information other than that set forth in the notice of sale.

(f) Notwithstanding the foregoing, Plaintiff (in its capacity as the mortgage-holder or otherwise), may elect in it sole discretion to provide information concerning the Mortgaged Property, in additional to the information contained in the notice of sale, to the Selling Officer or to prospective bidders. Plaintiff may condition the providing of such information upon such conditions as it deems appropriate in its sole discretion, including, without limitation, the execution of a confidentiality agreement or disclosure of financial ability. Plaintiff's willingness to provide additional information to one or more persons or otherwise to assist or cooperate with one or more prospective bidders shall not operate, in any way, to obligate Plaintiff to provide such information or otherwise cooperate with or

assist any other persons or entities who may be prospective bidders. Nothing contained herein shall restrict the right of Plaintiff, at any time, to (i) sell or otherwise transfer all or any portion of its rights in the Loan Documents or this Judgment of Foreclosure; or (ii) enter into an agreement to sell or otherwise transfer the Mortgaged Property conditioned upon Plaintiff's purchase thereof by the sale authorized hereby.

38. Election of Property If the Mortgaged Property is susceptible of division, the person conducting the sale may order it to be sold as necessary to satisfy this judgment and pursuant to the requirements of Illinois law.

39. Certificate of Sale Upon the sale of the Mortgaged Property, the person conducting the sale shall issue, in duplicate, and give to the purchaser a Certificate of Sale. The Certificate of Sale shall be in a recordable form, describe the property purchased, indicate the date and place of sale and show the amount paid therefor. The Certificate of Sale shall further indicate that it is subject to confirmation by the Court. The duplicate certificate may be recorded in accordance with 735 ILCS 5/12-121.

40. Report of Sale Upon the sale of the Mortgaged Property, the person who conducted the sale shall, with all convenient speed, report the same and his actions and doings in connection therewith to the Court for its approval and confirmation. The certificate shall be freely assignable by endorsement thereon.

VIII. TRANSFER OF TITLE

41. Upon or after confirmation of the sale, the person who conducted the sale or the Court shall execute a deed and bill of sale to the holder of the Certificate of

Sale sufficient to convey title to the property sold, which deed and bill of sale shall identify the court and the caption of the case in which judgment was entered authorizing issuance of the deed and bill of sale.

42. Delivery of the deed and bill of sale executed on the sale of the Mortgaged Property, even if the purchaser or holder of the Certificate of Sale is a party to the foreclosure, shall be sufficient to pass the title thereto. Such conveyance shall be an entire bar of (i) all claims of parties to the foreclosure and (ii) all claims of any unknown owners and non-record claimants, except as set forth in paragraph 30 herein.

IX. APPLICATION OF PROCEEDS

43. Application of Proceeds The proceeds resulting from the sale ordered herein shall be applied in the following order:

(a) the reasonable expenses of sale;

(b) the reasonable expenses of securing possession before sale, holding, maintaining, and preparing the mortgaged real estate for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, management fees, and, reasonable attorneys' fees, payments made pursuant to 735 ILCS 5/15-1505 and other legal expenses incurred by Plaintiff;

(c) the Indebtedness, plus (i) all accrued interest at the statutory rate of interest subsequent to entry of this Judgment of Foreclosure, and (ii) any attorneys' fees and expenses or other costs of suit incurred by Plaintiff, due and owing to Plaintiff; and

(d) any surplus to be held pending further order of the Court.

44. Deficiency Plaintiff, without waiving any rights or causes of action it may have with respect to the personal liability of the defendants herein, does not seek in this action to pursue any personal liability claims against the defendants herein. Notwithstanding the foregoing, if the money arising from the sale of the Mortgaged Property shall be insufficient to pay the Indebtedness due Plaintiff, including interest, costs, expenses, and fees related to this proceeding and sale, the Selling Officer shall specify the amount of such deficiency in its Report of Sale and Distribution. Notwithstanding any such reported deficiency, the defendants shall not be personally liable for the deficiency.

X. OTHER MATTERS

45. Possession Upon executive and delivery of the deed and bill of sale, the grantee or grantees in such deed and bill of sale or their heirs, successors or assigns, shall be let into possession of the Mortgaged Property so conveyed, and, subject to paragraph 35 hereof, any of the parties to this cause who may be in possession of the Mortgaged Property or any portion thereof and any person who since the commencement of this suit has entered into possession of the Mortgaged Property or any portion thereof, upon the production of the deed and bill of sale as aforesaid or a certified copy thereof, shall surrender possession of the Mortgaged Property to the grantee or grantees, his or their heirs, successors or assigns, and in default of so doing, a writ of assistance may issue in accordance with the practice of this Court.

46. Repair, Restoration and Maintenance Expenses. Any issues concerning the various parties' rights relating to sums expenses by Walsh, Higgins for maintenance, repair and restoration of the Mortgaged Premises, or relating to the expired lease of Bell Telephone Laboratories, Inc. or relating to settlement proceeds, if any, under such lease, are hereby reserved, and the Court retains jurisdiction to determine any disputes relating to the foregoing matters.

47. Appealability. The Court hereby expressly finds that there is no just reason to delay the enforcement of or appeal from this final and appealable Judgment of Foreclosure and Sale.

48. Jurisdiction. The Court reserves and maintains jurisdiction of the subject matter hereof and of the parties hereto for the purpose of entering such other and further orders, consistent with the provisions of this Judgment of Foreclosure, as the Court may deem advisable.

DATED: 12-2-96

ENTERED:

/s/_____
Judge John W. Darrah

Prepared and submitted by

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Beverley J. Klein, Esq.
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Attorneys for Teachers Insurance and
Annuity Association of America

[Dated November 16, 1996]

**IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS**

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, a New York corporation,	)	
Plaintiff,	)	
v.	)	No. 95 CH 0829
	)	Judge John W. Darrah
LASALLE NATIONAL BANK not personally but as Trustee under Trust Agreement dated September 4, 1984 and known as Trust No. 108920, et al.,	)	Courtroom 2005
Defendants.	)	

ORDER

This cause coming on to be heard on Plaintiff's Renewed Motion for Summary Judgment, due notice having been given, the Court having heard argument and being fully advised in the premises, it is hereby ordered that Plaintiff's Renewed Motion for Summary Judgment is hereby granted.

Dated: November 16, 1996

ENTER ORDER:

/s/_____
Judge John W. Darrah

Order prepared by:

Mayer, Brown & Platt
Firm ID No. 53280
190 S. LaSalle Street
Chicago, Illinois 60603
(312) 782-0600

[Filed July 11, 1996]

**IN THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT
DU PAGE COUNTY, ILLINOIS**

TEACHERS INSURANCE AND ANNUITY ASSOCIATION OF AMERICA, a New York corporation,	)	
Plaintiff,	)	
v.	)	No. 95 CH 0829
LASALLE NATIONAL BANK, not personally but as Trustee under Trust Agreement dated September 4, 1984, and known as Trust No. 108920; 200 PARK PLAZA ASSOCIATES, an Illinois limited partnership; W/H PARTNERSHIP NO. 2, an Illinois limited partnership; MATTHEW M. WALSH, JR.; DANIEL J. WALSH, JOHN W. HIGGINS; CHRISTOPHER NOON; WALSH, HIGGINS & CO.; NON-RECORD CLAIMANTS; and UNKNOWN OWNERS,	)	
Defendants.	)	

AMENDED

VERIFIED ANSWER AND AFFIRMATIVE DEFENSES TO VERIFIED COMPLAINT FOR FORECLOSURE AND OTHER RELIEF

NOW COME Defendants 200 Park Plaza Associates ("200 PPA") and Walsh, Higgins & Co. ("Walsh, Higgins"), by their attorneys, Donovan & Roberts, P.C., Kevin M. Forde, Ltd., and Richard J. Prendergast, Ltd.,

and in answer to Plaintiff's, Teachers Insurance and Annuity Association of America ("Teachers"), Verified Complaint state as follows:

1. Plaintiff files this Complaint to foreclose the Mortgage and Security Agreement, as modified (the "Mortgage"), as hereinafter described, and for other relief. Plaintiff joins the following persons as defendants:

(a) LaSalle National Bank, not personally, but as Trustee ("Trustee") under Trust Agreement dated September 4, 1984, and known as Trust No. 108920 ("Trust");

(b) 200 Park Plaza Associates, an Illinois limited partnership, the sole beneficiary of the Trust (the "Beneficiary");

(c) W/H Partnership No. 2, an Illinois limited partnership and general partner of 200 Park Plaza Associates;

(d) Matthew M. Walsh, Jr., Daniel J. Walsh, John W. Higgins and Christopher Noon, general partners in W/H Partnership No. 2;

(e) Non-Record Claimants; and

(f) Unknown Owners.

ANSWER: Defendants admit that plaintiff has joined certain individuals and entities as defendants in this action, but deny that W/H Partnership No. 2, Matthew Walsh, Jr., Daniel J. Walsh, John W. Higgins and Christopher Noon are proper party defendants.

2. Attached as Group Exhibit "A" are a copy of the Mortgage, a First Modification of the Mortgage and a

Second Modification thereof (collectively, the "Mortgage, as modified"), and attached as Group Exhibit "B" are copies of a Mortgage Note (as modified by the modifications contained in Group Exhibit "A") and a Mortgage Note No. 2 (collectively, the "Notes") secured thereby.

ANSWER: Defendants admit the allegations of paragraph 2.

3. Information concerning the Mortgage, as modified, to be foreclosed is as follows:

(a) Nature of Instrument: Mortgage;

ANSWER: Defendants admit the allegations of paragraph 3(a).

(b) Date of Mortgage: August 9, 1985, as modified by that certain First Modification dated March 20, 1987, and as further modified by that certain Second Modification dated November 20, 1987;

ANSWER: Defendants admit the allegations of paragraph 3(b).

(c) Name of Mortgagor: LaSalle National Bank, not individually but solely as Trustee under Trust Agreement dated September 4, 1984, and known as Trust No. 108920 ("Mortgagor");

ANSWER: Defendants admit the allegations of paragraph 3(c).

(d) Name of original Mortgagee: First National Bank of Chicago;

ANSWER: Defendants admit the allegations of paragraph 3(d).

(e) Dates and place of recording: August 21, 1985, March 20, 1987, and December 1,

1987; Office of the Recorder of Deeds of DuPage County;

ANSWER: Defendants admit the allegations of paragraph 3(e).

(f) Identification of recordings: R85-69263 and 85U-4386; R87-038820; and R87-169379;

ANSWER: Defendants admit the allegations of paragraph 3(f).

(g) Interest subject to the Mortgage: fee simple;

ANSWER: Defendants admit the allegations of paragraph 3(g).

(h) Amount of original principal indebtedness under the Mortgage: $27,000,000.00, increased to $32,800,000.00 by Mortgage Note No. 2;

ANSWER: Defendants admit the allegations of paragraph 3(h).

(i) Legal description of mortgaged real estate and common address: (see attached Exhibit "C");

ANSWER: Defendants admit that Exhibit C contains a legal description of the mortgaged real estate and its common address.

Commonly known as: 200 Park Plaza, Naperville, DuPage County, Illinois (the "Mortgaged Premises");

Permanent Index No.: 07-01-400-034;

ANSWER: Defendants admit the remaining allegations of paragraph 3(i).

(j) Statement as to defaults and amount now due:

Pursuant to the express terms of the Notes and Mortgage, as modified, the entire unpaid principal balance of the Notes, together with all accrued and unpaid interest thereon, are due and payable. Under the express terms of the Notes, an event of default has occurred and as of October 31, 1995, the following amounts (exclusive of attorneys' fees and costs and other related charges) were due and owing:

Note No. 1:

Outstanding Principal	$26,984,004.68
Accrued Interest	834,817.64
Late Charges	28,237.50
TOTAL	$27,847,059.82

Note No. 2:

Outstanding Principal	$ 5,792,372.38
Accrued Interest	133,948.61
Late Charges	4,659.34
TOTAL	$ 5,930,980.33

TOTAL AMOUNT DUE $33,778,040.15*

*In addition, Contingent Interest on Note No. 1, as defined therein, is due to the mortgagee for 1995 in an amount as yet undetermined.

ANSWER: Defendants deny the allegations of paragraph 3(j).

(k) Statement as to per diem interest accruing under the Mortgage, as modified, as of October 31, 1995;

$13,656.83, consisting of $11,243.34 on the Note and $2,413.49 on Note No. 2;

ANSWER: Defendants deny the allegations of paragraph 3(k).

(l) Name of present owner of the real estate: LaSalle National Bank, not personally but as Trustee under Trust Agreement dated September 4, 1984, and known as Trust No. 108920;

ANSWER: Defendants admit the allegations of paragraph 3(l).

(m) Names of other persons who are joined as defendants and whose interest in or lien on the mortgaged real estate is sought to be terminated: 200 Park Plaza Associates; W/H Partnership No. 2; Matthew M. Walsh, Jr.; Daniel J. Walsh; John W. Higgins; Christopher Noon; Walsh, Higgins & Co.; Non-Record Claimants; and Unknown Owners;

ANSWER: Defendants deny that plaintiff is entitled to terminate the interest of defendants in the property.

(n) Names of defendants claimed to be personally liable for deficiency, if any: Plaintiff reserves the right to seek a deficiency judgment against any and all persons liable to Plaintiff for indebtedness secured by the Mortgage, as modified herein;

ANSWER: See answer to paragraph 3(m). Defendants deny that any of them are personally liable for the deficiency, if any.

(o) Capacity in which Plaintiff brings this foreclosure: Plaintiff is the assignee and present holder of the Notes and Mortgage, as modified;

ANSWER: Defendants admit the allegations of paragraph 3(o).

(p) Facts in support of a waiver of redemption period: Pursuant to paragraph 28 of the Mortgage, the Mortgagor has waived all rights of redemption on behalf of Mortgagor and on behalf of all other persons acquiring any interest in or title to the Mortgaged Premises subsequent to the date of the Mortgage (except as to decree or judgment creditors);

ANSWER: Paragraph 28 of the Mortgage speaks for itself and defendants deny any allegation in paragraph 3(p) inconsistent therewith. Defendants further deny that plaintiff is entitled to enforce the Mortgage against them.

(q) Facts in support of request for attorneys' fees and costs and expenses: Pursuant to the paragraph 14 of the Mortgage, all costs and expenses, including reasonable attorneys' fees incurred, with interest, in addition to principal and interest under the Note, are recoverable herein and Plaintiff reserves the right to include any and all such amounts in a judgment of foreclosure;

ANSWER: Paragraph 14 of the Mortgage speaks for itself and defendants deny any allegation in paragraph 3(q) inconsistent therewith. Defendants further deny that plaintiff is entitled to enforce the Mortgage against them.

(r) Facts in support of request for appointment of receiver: Plaintiff reserves all of its rights under the Notes and Mortgage,

as modified, including, without limitation, paragraph 17 of the Mortgage, to seek possession of the Mortgaged Property through appointment of a receiver; and

ANSWER: Defendants deny that plaintiff is entitled to seek appointment of a receiver.

(s) Plaintiff does not offer to Mortgagor in accordance with 735 ILCS 5/15-1402 to accept title to the mortgaged real estate in satisfaction of all indebtedness and obligations secured by the Mortgage without a judicial sale.

ANSWER: This paragraph contains no factual allegations to which a response is required, but to the extent a response is deemed necessary, defendants deny the allegations of paragraph 3(s).

4. Plaintiff avers that in addition to the persons designated by name herein, there are other persons who are interested in this action and who have or claim some right, title, interest or lien in, to or upon the real estate or some part thereof in this Complaint described; that the name, present and last known place of residence of each of such other persons is unknown to the Plaintiff, and upon diligent inquiry cannot be ascertained, and all such persons are, therefore, made parties defendant to this action by the name and description of Unknown Owners.

ANSWER: Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 4.

5. Plaintiff avers that in addition to the persons designated by name herein, there may be other persons

who are interested in the action or who have or claim some right, title, interest or lien in, to or upon the Mortgaged Premises or some part thereof described herein, which is not disclosed of record by recorded notice or proceeding which would give constructive notice to the parties who are fully defined in 735 ILCS 5/15-1210. The name of each of such persons is unknown to Plaintiff and on diligent inquiry cannot be ascertained. Accordingly, all such persons are made parties-defendant to this action by the name and description of "Non-Record Claimants."

ANSWER: Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5.

6. The foreclosure and lien rights set forth in paragraphs 1 through 5 of this Complaint are first, superior and prior to any lien rights of any other person or party in and to the same Mortgaged Premises, including any lien and foreclosure rights which may exist in favor of any person joined as a defendant herein and whose interest in, or lien to, the Mortgaged Premises is sought to be terminated.

ANSWER: Defendants deny the allegations of paragraph 6.

AFFIRMATIVE DEFENSES

Defendants, by their attorneys, assert the following Affirmative Defenses:

1. Plaintiff 200 PPA is an Illinois limited partnership. 200 PPA is the owner and developer of 200 Park

Plaza, a five-story 308,000 square foot building offering premium office space.

2. Walsh, Higgins is a full-service real estate company which provides its clients with the highest levels of service and quality in all areas of development, build-to-suit services, corporate real estate services, program management and asset management. Since its inception in 1980, Walsh, Higgins has successfully developed projects in excess of $1 billion in the Chicago metropolitan area and the midwest. Walsh, Higgins offers complete asset management service, including leasing, property management and construction services for its own portfolio and for third-party clients. Walsh, Higgins' Asset Management Group oversees a portfolio consisting of over four million square feet of office, industrial, retail and residential properties. Pursuant to a written agreement, Walsh, Higgins is the designated property manager, the leasing agent and development agent for 200 Park Plaza.

3. In 1985, plaintiff 200 PPA and First National Bank of Chicago ("FNB") entered into a transaction to finance the construction of 200 Park Plaza. Under the terms of the agreement, FNB loaned 200 PPA a total of $27,000,000 on a non-recourse basis. The indebtedness is evidenced by a Mortgage and a Note bearing interest at the rate of 12 3/8% per annum.

4. On March 17, 1987, the Note and Mortgage evidencing the loan were assigned by FNB to Teachers. After the assignment, Teachers increased the loan amount by an additional $5,800,000 as evidenced by a Note in that amount bearing interest at the rate of 9 1/4% per annum.

5. As part of the transaction, 200 PPA agreed, among other things, that in addition to regular principal and interest payments on the loan, it would also pay Teachers 50% of the gross income of the project over an agreed upon base. Under the terms of the Notes, 200 PPA is prohibited from prepaying the Notes during the first 17 years of the Mortgage. 200 PPA is also required to obtain Teachers' approval for all leases for the building. In addition, Teachers took an assignment of the rents to secure payment under the Notes.

6. With Teachers' approval and the additional funding of $5,800,000, the entire building was initially leased to a single tenant, AT&T, for an eight-year, seven-month term expiring September 30, 1995. AT&T utilized the space for its Bell Labs Division which required a specialized and expensive build-out to accommodate extensive computer systems and other equipment. During the term of the lease, AT&T also made substantial improvements to the premises at its own expense.

7. Since the inception of the Teachers' loan, 200 PPA has complied with all terms of the loan, including timely payment of all sums due to Teachers. For its part, Teachers has derived substantial financial benefits from the transaction. On the $27,000,000 Note bearing interest at the rate of 12 3/8% per annum, Teachers has received interest payments totalling $27,273,346.51 and principal payments totalling $11,934.74 through June 1995. On the $5,800,000 Note bearing interest at the rate of 9 1/4% per annum, Teachers has received interest payments totalling $4,092,644.19 and principal payments totalling $5,698.70 through June 1995. Teachers has also received profit sharing payments through June

1985 totalling $1,552,509.25. Teachers has thus received total payments through June 1995 of approximately $33,000,000 as a result of this transaction.

8. AT&T's lease provided AT&T the option to extend its lease for two additional five-year terms. Because of the substantial investment AT&T had made in the premises over the initial term of the lease, 200 PPA reasonably believed that AT&T would elect to remain in the building. However, by 1993, when 200 PPA and Walsh, Higgins commenced discussions with AT&T regarding extension of the lease, rent under the lease was above market.

9. Walsh, Higgins engaged in negotiations with AT&T regarding extension of the lease and with Teachers regarding restructuring of the loan which would be necessitated by a reduction in the rent under the AT&T lease. Those negotiations were unsuccessful and in September 1994 AT&T notified 200 PPA that it would vacate the building which it did some months prior to the expiration of the lease term on September 30, 1995.

10. The loss of the building's sole tenant posed serious financial consequences to 200 PPA. Among other things, in order to re-let the premises, 200 PPA would be required to sub-divide the AT&T space and build out the individual office suites to prospective tenants' specifications at significant expense. 200 PPA also anticipated that after AT&T vacated the premises, there would be some period of time during which the building would not be fully occupied thus resulting in a reduced income stream.

11. 200 PPA immediately informed Teachers of AT&T's decision and also informed Teachers that the

loss of the building's sole tenant necessitated a restructuring of the loan.

12. 200 PPA and Teachers immediately began discussions to restructure the financing relative to the building in order to accommodate the need to make capital improvements and to obtain new tenants for the building. PPA made an initial proposal to Teachers regarding the restructuring on October 12, 1994. This proposal was presented in a comprehensive investment analysis bearing the same date.

13. From the beginning of the negotiations and repeatedly throughout, Teachers' representatives requested current market information from Walsh, Higgins. Such information was provided on an ongoing basis along with assurances from Walsh, Higgins personnel that there was a healthy demand for office space in the market in which 200 Park Plaza was located and that prospects for a full lease-up were excellent.

14. Substantial discussions ensued during which Teachers indicated that it required certain terms in order to agree to a restructuring. 200 PPA developed a recapitalization plan which incorporated financial parameters required by Teachers. This plan was formalized in an investment analysis dated February 3, 1995. The essential components of the restructuring were as follows: 1) a capital contribution of $1,000,000 from 200 PPA; 2) funding of necessary tenant improvements through third-party financing; 3) a below market interest rate for an initial term coupled with a retroactive rent credit; 4) graduated increases in the interest rate over the life of the loan; and 5) a "look-back" rate of return (the "look-back IRR") which would guarantee

Teachers a specified return on a retrospective basis at the end of the loan term.

15. John W. Higgins, Chairman and CEO of Walsh, Higgins and David Riefe, another Walsh, Higgins employee, met with representatives of Teachers regarding the restructuring on March 15, 1995. Another investment analysis containing updated leasing information was prepared for the meeting. During the meeting the proposed restructuring was explained and discussed in detail. Specifically, Higgins explained how the third-party financing for tenant improvements would work and how it would be secured. In response to Higgins' inquiry, Robert Nagler, Teachers' authorized representative, stated that the transaction was "definitely something that could work."

16. Also early in 1995, Walsh, Higgins was engaged in negotiations with a number of prospective tenants for the building, most significantly, AMOCO Corporation ("AMOCO"). By February, a draft lease for 60,000 square feet had been tendered to AMOCO by Walsh, Higgins and forwarded to Teachers for its review. In connection with the AMOCO transaction, as reflected in the various financial analyses provided to Teachers, ownership would have been obligated to expend substantial sums to improve the AMOCO space which improvements were to be funded with the third-party financing Walsh, Higgins was pursuing.

17. Following the meeting, Riefe wrote to Nagler summarizing the meeting and listing matters which required Teachers' immediate attention. Riefe stated: "As we discussed, ownership will need assurance from Teachers that a viable refinancing structure is in place

before executing the AMOCO lease and committing to the associated improvement costs and other landlord obligations."

18. Throughout March and April, Walsh, Higgins continued to forward updated drafts of the AMOCO lease to Teachers. Teachers forwarded to Walsh, Higgins subordination language for inclusion in the lease.

19. On April 6, 1995, Higgins wrote to Nagler and with respect to the LaSalle financing, Higgins stated that LaSalle was interested in pursuing the transaction and wanted to meet with Teachers' representatives. The letter also informed Nagler that negotiations were proceeding with other prospective tenants, including Metra Health Insurance Company ("MetraHealth").

20. Toward the end of April, Higgins had a conversation with Nagler in which Nagler informed him that responsibility for the loan was being transferred to the work-out unit within Teachers. When Higgins inquired whether the transfer meant there was a problem, Nagler assured him that Teachers wanted to restructure the loan and that the work-out unit had the expertise to finalize the transaction. Nagler further informed Higgins that the head of the work-out unit was Charles Wyllie. Wyllie later informed Higgins that the individual within the unit responsible for the transaction was Stanley McDaniel.

21. Higgins and Riefe thereafter had a lengthy conversation with McDaniel in which they described the restructuring, including the LaSalle financing, and the specifics of the AMOCO lease. Higgins emphasized how important the restructuring was to the AMOCO lease. He asked McDaniel several questions during the con-

versation regarding the viability of the structure, the pay rate and the look-back IRR. McDaniel responded that the structure seemed very workable, that the pay rates might need a little "tweaking" and that the look-back IRR seemed a little "light." In response to Higgins' further question as to whether they should continue to pursue the AMOCO lease, McDaniel stated that "as far as the overall structure was concerned, there would be absolutely no backtracking on Teachers' part from that point."

22. Higgins followed up the conversation with McDaniel with a May 1, 1995 letter. In his letter, Higgins explained that Walsh, Higgins had reached a critical juncture with respect to several leasing transactions and that further direction from Teachers was essential. With respect to the AMOCO lease, Higgins stated that execution copies were expected shortly, but that "[b]efore the subject lease may be signed, however, it is imperative that a restructuring plan for this asset is in place."

23. On May 17, 1995, Higgins forwarded the final version of the AMOCO lease to McDaniel. The lease had already been executed by AMOCO and Higgins requested Teachers' consent to the lease.

24. A meeting with Teachers, LaSalle and Walsh, Higgins representatives was scheduled for May 24, 1995, at Teachers' offices in New York. The meeting was attended by Higgins, Riefe, McDaniel and Karen Case and Tom Boback, both of LaSalle. An updated Financial Analysis, including current leasing information as well as further illustration of the LaSalle financing, was prepared for the meeting. The LaSalle

financing was discussed at length during the meeting. In particular, there was discussion of the fact that, as to space improved with funding from LaSalle, LaSalle would be repaid from a portion of the rents amortized over the length of the lease and that, in the event of a foreclosure, LaSalle would be permitted to put its loan to Teachers to be paid off. McDaniel indicated that the put provision of the LaSalle financing was "no problem."

25. Higgins and Riefe also spoke to McDaniel and Wyllie regarding the transaction on June 7, 1995. Wyllie indicated that he had spoken to other Teachers' officers and that he had been told that the Chicago/Naperville market was one of the few in the country that was coming back strong. The restructuring was discussed and Higgins asked Wyllie where they stood in that regard. Wyllie responded that the transaction was "pretty far along" and that the "devil was in the details." Wyllie further indicated that he wanted to look at the value of the project and "play with" the discount rate. The range of rates under discussion at that time was 5 - 6 1/2% as a going in rate and 8 1/2 - 9 1/2% as a look-back IRR. McDaniel requested that Higgins and Riefe supply him with computer runs which would show the effect on the project at various interest rates.

26. Shortly after the conference call, Higgins received a call from McDaniel who indicated that Teachers no longer wanted to agree to the put concept as a means of securing the LaSalle financing and that Higgins should come up with an alternative. Higgins expressed his frustration at Teachers' about-face, but indicated that he would explore an alternative.

27. Higgins thereafter discussed with Case an alternative which would involve LaSalle taking a first assignment of a portion of the rents on space improved with its funds which assignment would survive a foreclosure. Case indicated that she was amenable to pursuing that alternative and that, subject to review by counsel, she was prepared to recommend that alternative to LaSalle's loan committee.

28. Higgins and Riefe contacted McDaniel and informed him of the alternative proposal for securing the LaSalle funds. McDaniel indicated that he would have to talk to Wyllie and Teachers' in-house counsel and that he would get back to them.

29. On June 15, 1995, Higgins and Riefe again spoke to McDaniel who indicated that both Wyllie and Teachers' legal department had approved the assignment alternative.

30. On June 20, 1995, Riefe forwarded to McDaniel correspondence from AMOCO and MetraHealth. The AMOCO correspondence reflected AMOCO's concern over Walsh, Higgins' failure to return the lease executed on behalf of the landlord given the approaching date for inception of the lease. AMOCO informed Walsh, Higgins that it was prepared to select another site if the transaction was not concluded by June 23, 1995. The MetraHealth correspondence enclosed a letter of intent from MetraHealth which contained a space for execution by Teachers as an indication of Teachers' agreement and consent to the terms of the proposed lease.

31. A conference call among Higgins, Riefe and McDaniel was set for June 22, 1995 at 2:00 p.m. Prior

to the conference call, Riefe faxed to McDaniel various scenarios showing the effect of interest rate variations on the financial analyses. One of the scenarios used interest rate figures provided by McDaniel in a conversation on June 20, 1995. During the conference call, McDaniel indicated that he would discuss the matter with Wyllie and get back to Riefe and Higgins as to "what pay rate and look-back Teachers would accept." Ownership was willing to accept the rates provided by McDaniel.

32. On June 23, 1995, Riefe received from McDaniel the signed consent to the AMOCO lease. At that point in time, Teachers was aware that ownership could not fulfill its obligations under the AMOCO lease without a restructuring of the loan from Teachers and without the third-party financing necessary to fund tenant improvements. Although the cover memo is dated June 22, 1995, the consent was not received by Riefe until the afternoon of June 23rd. The cover memo also asked Riefe to provide McDaniel with look-back IRR projections as soon as available.

33. Riefe faxed look-back projections to McDaniel on June 24, 1995, one of which showed that if 100% of the available residual proceeds were paid to Teachers, it would support a look-back IRR of 9.1%.

34. Between June 22nd and June 29th, Riefe and Higgins had no further discussions with McDaniel or anyone else from Teachers.

35. On June 29, 1995, Wyllie contacted Higgins and Riefe and informed them that McDaniel was no longer available to work on the transaction and that the new contact person would be Mark DePrima. Wyllie further

informed Higgins and Riefe that the "structure" would not work and that Teachers expected ownership to fund build-out and tenant improvements without third-party financing. Prior to that conversation and after the submission of the February 3, 1995 financial analysis, no one from Teachers had ever informed plaintiffs that the $1,000,000 equity contribution from the partnership was inadequate or that tenant improvements would have to be paid for through an equity contribution from the partners.

36. Despite repeated demands, Teachers has refused to honor the commitments it made to ownership.

37. In an effort to salvage the transaction, Higgins and Riefe continued discussions with Teachers after June 29, 1995. Teachers ultimately provided a term sheet on July 27, 1995. The pay rates and look-back IRR in Teachers' term sheet were within the range of rates under discussion prior to June 29, 1995, which Higgins had previously informed Teachers ownership would agree to. The major difference between Teachers' term sheet and the transaction prior to June 29th was the absence of any third-party financing and a requirement that ownership contribute $8,000,000 toward build-out and tenant improvement costs on an unsecured basis.

38. As a result of Teachers' refusal to go forward with the structure of the transaction as it existed prior to June 29, 1995, the AMOCO and MetraHealth leases were lost. In addition, AMOCO has demanded that 200 PPA reimburse it for costs incurred in connection with the aborted lease transaction.

FIRST AFFIRMATIVE DEFENSE
(BREACH OF FIDUCIARY DUTY)

1. - 38. As paragraphs 1 though 38 of their First Affirmative Defense, defendants repeat and reallege paragraphs 1 through 38 above as though fully set forth herein.

39. As alleged above, the Mortgage contains provisions which prohibit prepayment of the indebtedness for the first 17 years of the Mortgage and require 200 PPA to obtain Teachers' approval for all leases for the premises. The Mortgage also contains an assignment to Teachers of the rents received to secure payment under the Notes and includes provisions under which Teachers can and has shared in the profits derived from leasehold revenues. The foregoing provisions afford Teachers significant domination and control over the affairs of 200 PPA.

40. Given these provisions and by virtue of its dominant position, Teachers is under a fiduciary duty a) not to unreasonably withhold approval of leases presented to it for approval, b) to take such actions as may be necessary to preserve the building, c) not to engage in self-dealing or other conduct for its own benefit to the detriment of the project's financial viability, d) to fulfill its obligations under agreements negotiated with 200 PPA to preserve the economic viability of the project and e) not to engage in conduct which has the effect of impairing the value of the assignment of rents and interfering with 200 PPA's ability to service the debt which, under the Teachers Notes and Mortgage, it is precluded from prepaying.

41. By its conduct described above, Teachers has breached the aforementioned duties by refusing to

proceed with the restructuring to which it had previously agreed, refusing to provide the assurances requested by AMOCO and refusing to execute the letter of intent with MetraHealth. Teachers' conduct also violates the duty of good faith and fair dealing implied in its contracts with 200 PPA.

42. By virtue of the fact that Teachers has breached its fiduciary duties as alleged above, the equitable relief of foreclosure should be denied.

SECOND AFFIRMATIVE DEFENSE
(BREACH OF CONTRACT)

1. - 42. As paragraphs 1 though 42 of their Second Affirmative Defense, defendants repeat and reallege paragraphs 1 through 42 above as though fully set forth herein.

43. In unreasonably withholding approval of the MetraHealth letter of intent and by reneging on its approval of the AMOCO lease, Teachers has breached the provisions of the Mortgage which require Teachers' approval of all leases for the premises.

44. Teachers' conduct as alleged in paragraph 43 and Teachers' refusal to proceed with the restructuring negotiated between 200 PPA and Teachers also constitutes a breach of the duty of good faith and fair dealing implied in its contracts with 200 PPA.

45. By virtue of Teachers' breach of the very contract it seeks to enforce against defendants, the equitable relief of foreclosure should be denied.

THIRD AFFIRMATIVE DEFENSE
(UNCLEAN HANDS)

1. - 45. As paragraphs 1 through 45 of their Third Affirmative Defense, defendants repeat and reallege paragraphs 1 through 45 above as though fully set forth herein.

46. Teachers' inequitable and unconscionable conduct, as alleged above, renders the equitable relief of foreclosure unavailable to Teachers by virtue of the doctrine of unclean hands.

FOURTH AFFIRMATIVE DEFENSE (FRAUD)

1. - 46. As paragraphs 1 through 46 of their Fourth Affirmative Defense, defendants repeat and reallege paragraphs 1 through 46 above as though fully set forth herein.

47. On information and belief, Teachers' assurances to defendants as alleged above and its representation that there would be no backtracking from terms already agreed upon constituted false statements of material fact which Teachers either knew or should have known were false when made.

48. On information and belief, Teachers' statements were made with the intent to deceive defendants and to induce defendants to rely and act upon said statements.

49. Defendants did, in fact, rely and act upon Teachers' statements in refraining from pursuing alternative financing arrangements, in undertaking commitments to AMOCO, in negotiating a letter of intent with MetraHealth and in pursuing third-party financing with LaSalle, among others.

50. As a result of Teachers' fraudulent conduct, defendants have been injured as follows:

a) 200 PPA has lost the opportunity to pursue alternative financing arrangements;

b) the loss of tenants for more than 40% of the rentable space of the building threatens the viability of the entire project and impairs 200 PPA's ability to service the debt to Teachers;

c) 200 PPA and Walsh, Higgins have been exposed to claims by AMOCO for expenses allegedly arising out of the lease executed by AMOCO and approved by Teachers;

d) the reputations of both 200 PPA and Walsh, Higgins in the commercial real estate community have been damaged by their inability to live up to commitments they made to prospective tenants.

51. As a result of Teachers' fraudulent conduct, Teachers cannot seek the equitable relief of foreclosure.

FIFTH AFFIRMATIVE DEFENSE
(CONSTRUCTIVE FRAUD)

1. - 52. As paragraphs 1 though 52 of their Fifth Affirmative Defense, defendants repeat and reallege paragraphs 1 through 52 above as though fully set forth herein.

52. By virtue of Teachers' ability to dominate and control 200 PPA's affairs as alleged above, a relationship of trust and confidence arose between 200 PPA and Teachers.

53. Teachers breached the duties inherent in its relationship with 200 PPA as more fully alleged in paragraphs 40 and 41, above.

54. Teachers' conduct amounts to a constructive fraud upon 200 PPA and Walsh, Higgins, each of whom relied upon Teachers' representations and conduct to their detriment.

55. As a result of Teachers' constructive fraud, plaintiffs have been injured as follows:

a) 200 PPA has lost the opportunity to pursue alternative financing arrangements;

b) the loss of tenants for more than 40% of the rentable space of the building threatens the viability of the entire project and impairs 200 PPA's ability to service the debt to Teachers;

c) 200 PPA and Walsh, Higgins have been exposed to claims by AMOCO for expenses allegedly arising out of the lease executed by AMOCO and approved by Teachers;

d) the reputations of both 200 PPA and Walsh, Higgins in the commercial real estate community have been damaged by their inability to live up to commitments they made to prospective tenants.

56. As a result of Teachers' constructive fraud, Teachers cannot seek the equitable remedy of foreclosure.

SIXTH AFFIRMATIVE DEFENSE (ESTOPPEL)

1 - 56. As paragraphs 1 through 56 of their Sixth Affirmative Defense, defendants repeat and reallege

paragraphs 1 through 56 above as though fully set forth herein.

57. By its conduct in agreeing to the terms of the restructuring and expressly assuring 200 PPA and Walsh, Higgins that they were entitled to rely upon those terms as a basis for proceeding with leasing activity and third-party financing, Teachers intended that 200 PPA and Walsh, Higgins would rely and act upon that conduct and those assurances. 200 PPA and Walsh, Higgins, in fact, did reasonably rely and act upon Teachers' conduct and representations in pursuing lease discussions with AMOCO and MetraHealth and in pursuing third-party financing with LaSalle.

58. On information and belief, at the time of the conduct and representations described herein, Teachers had no intention of abiding by the terms of the restructuring it had already agreed to.

59. 200 PPA and Walsh, Higgins have relied upon Teachers' conduct and representations to their detriment. If Teachers had informed 200 PPA from the outset that it was not interested in restructuring the loan, 200 PPA could have pursued alternative methods of financing including outside equity, participating debt, second mortgages and prepayment. Moreover, had Teachers not indicated its agreement to the terms of the restructuring, 200 PPA and Walsh, Higgins would not have undertaken the commitments to AMOCO and MetraHealth in connection with the leasing of 120,000+ square feet of office space to these entities. In addition, the commitments and representations 200 PPA and Walsh, Higgins made to AMOCO and MetraHealth has exposed 200 PPA and Walsh, Higgins to claims by these prospective tenants and, in fact, AMOCO has already

demanded that 200 PPA and Walsh, Higgins reimburse it for expenses AMOCO claims to have expended in connection with the lease.

60. By virtue of its conduct, Teachers is equitably estopped to seek the equitable remedy of foreclosure.

WHEREFORE, defendants respectfully request that plaintiff's Complaint be dismissed, that judgment be entered in defendants' favor and for such other and further relief as the Court deems just and appropriate.

Respectfully submitted,

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